Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1726

MRS. FRANCES NELL HIGGINBOTHAM, ET AL.,
Respondents

versus

MOBIL OIL CORPORATION, ET AL.,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CARL J. SCHUMACHER, JR.
1106 Arabella Street
New Orleans, Louisiana 70115
(504) 899-8904
Attorney for Petitioner,
Mobil Oil Corporation

Of Counsel
CHARLES C. GRAY
P.O. Box 900
Dallas, Texas 75221
(214) 658-3348

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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Mobil Oil Corporation, petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the fifth circuit.

OPINIONS BELOW

The opinion of the court of appeals, printed as Appendix C, p. A-54, hereto, is reported *sub nom*, *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422 (5th Cir. 1977). The district court's initial opinion, printed as Appendix A, p. A-1 hereto, is reported under the same style at 357 F.Supp. 1164 (W.D. La. 1973); while the second opinion, which deals with the issue of damages, printed as Appendix B, p. A-32 hereto, is reported at 360 F.Supp. 1140 (W.D. La. 1973).

JURISDICTION

The judgment of the court of appeals, printed as Appen-

dix E, p. A-96, is dated January 13, 1977. An order of the court of appeals denying Petitioner's motion for rehearing and suggestion for rehearing en banc, printed as Appendix D, p. A-94, is dated March 7, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether the maritime cause of action for death occurring within a state's territorial waters created by this Court in Moragne[1] completely replaces the statutory cause of action for death mandated by Congress with respect to deaths occurring within the geographical scope of the Death on the High Seas Act.[2]

(2) When an employee meets his death while assigned to a fixed platform on the outer continental shelf, is the exclusive remedy of the employee's beneficiaries against his employer the compensation remedy mandated by the Outer Continental Shelf Lands Act[3] or can such beneficiaries recover under the Jones Act[4] or the general maritime law as if the employee was a seaman simply because he had worked for his employer as a seaman in the past?

1. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970). This decision will be referred to as *Moragne*.

2. 45 U.S.C. §§ 761-68 (1920) (hereafter DOHSA). The geographical scope of DOHSA was not involved in *Moragne* where the death occurred within the territorial waters of a state, as DOSHA statute applies only to maritime casualties which occur "on the high seas beyond a marine league from the shore" of the United States.

3. 43 U.S.C. §§1301-43 (1953) (hereafter Lands Act.)

4. 46 U.S.C. § 688 (1920).

(3) In death actions against both the operator and manufacturer of a helicopter arising out of a crash in the Gulf of Mexico in which plaintiffs offered substantial evidence of a manufacturing defect as the cause of the crash, and the Court found the . . . ., "evidence is so insufficient that no actual, probable or suggestive cause of the crash. . . [can] be determined with any degree of certainty." A-63. Can a judgment against the operator only based upon res ipsa loquitor be maintained?

STATUTES INVOLVED

The relevant portions of DOHSA, as amended, are as follows, 46 U.S.C. §761 (1970), 41 Stat. 537:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty,. . . against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. § 762 (1970), 41 Stat. 537:

> The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought.

The relevant portion of the Jones Act, as amended, is as follows, 46 U.S.C. § 688 (1970), 38 Stat. 1175:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

The relevant portions of the Lands Act, as amended, are as follows, 43 U.S.C. § 1333 (1970)67 Stat. 462:

> Jurisdiction of United States District Courts
>
> (b) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf, for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, . . .

> Applicability of Longshoremen's and Harbor Workers' Compensation Act; definitions
>
> (c) With respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section --
>
> (1) the term 'employee' does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;
>
> (2) the term 'employer' means an employer any of whose employees are employed in such operations; and
>
> (3) the term 'United States' when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

STATEMENT OF THE CASE

Petitioner Mobil Oil Corp. (hereafter Mobil) owned a helicopter which was used in its oil and gas drilling operations offshore Louisiana. On June 6, 1967, the aircraft landed on a fixed platform approximately 100 miles off the Louisiana

coast in the Gulf of Mexico for the purpose of deplaning several workers and picking up others, including James Nation. The helicopter disappeared within the geographic area covered by DOHSA shortly after take-off with only a few remnants of the aircraft being found. Three passengers and the pilot of the aircraft died in the casualty. One of the passengers (Marshall Higginbotham) was an employee of Baxter Drilling Company, while the other two passengers (James Shinn and James Nation) were in the employ of Mobil.

Litigation was commenced in a non-jury action in the district court against Mobil and Bell Helicopter Co., the manufacturer of the helicopter (hereinafter Bell), seeking damages for the deaths based on the general maritime law as enunciated by this Court in *Moragne* and *Gaudet*,[5] as well as the two federal statutes, the Jones Act and DOHSA. The district court held with respect to the two Mobil employees that the undisputed evidence established:

(1) that Nation was assigned to Mobil's fixed platform Baxter No. 3 from which the helicopter last departed at the time of the accident, and

(2) that Shinn was assigned to one of Mobil's drilling vessels at the time of the accident.

The district court therefore held that Nation was not a seaman because he was assigned to a stationary platform at the time of the accident,[6] while Shinn was a seaman because he was a member of the crew of a drilling vessel. Higginbotham was not an employee of Mobil and his beneficiaries thus asserted a third party action against Mobil.[7] The district court therefore concluded that the survivors of the three decedents came within the scope of the stated remedial statutes (Jones Act, DOHSA and Lands Act) and the general maritime decisional law (*Moragne*). As to each, the court held:

Higginbotham	DOHSA and the General Maritime law.[8]
Shinn	DOHSA, the General Maritime Law and the Jones Act.[9]
Nation	Lands Act.[10]

Having determined that the beneficiaries of Higginbotham and Shinn were entitled to recover under DOHSA and the general maritime law and as to Shinn's beneficiaries also as a seaman under the Jones Act, the district court held that the respective beneficiaries were entitled to recover only the pecuniary damages mandated by Congres in both DOHSA and the Jones Act, and that the death action created in *Moragne* did not make non-pecuniary damages recoverable under the general maritime law for deaths occurring more than one marine league from shore.

5. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970). Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974). *Gaudet*, likewise, was limited to death occurring within state territorial waters and thus, DOHSA was not involved.

6. 357 F.Supp. 1164, 1177.

7. 357 F.Supp. 1164, 1175-1176.

8. 357 F.Supp. 1164, 1174-1175.

9. 357 F.Supp. 1164, 1175-1176.

10. 357 F.Supp. 1164, 1176-1178.

Concluding that Nation was assigned to a fixed platform on the outer continental shelf at the time of the accident, the district court held, as Congress mandated , that the Lands Act was the exclusive remedy of his survivors against his employer.[11]

As to the first question presented by this Petition, the panel of the court of appeals below held that the general maritime death action of *Moragne* and *Gaudet* had completely replaced DOHSA within its exclusive geographic sphere. The panel did so only because it considered itself bound by an earlier decision of another panel of the court of appeals below in *Law v. Sea Drilling Corp.*, 510 F.2d 242, *aff'd on rehearing*, 523 F.2d 793 (5th Cir. 1975) which had held that since *Moragne* provided "a federal maritime cause of action for death on navigable waters-- any navigable

11. The Lands Act expressly makes the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. applicable to injuries or deaths resulting from operations conducted on the outer continental shelf:

> "(c) With respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation act under this section --
>
> (1) the term 'employee' does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;
>
> (2) the term 'employer' means an employer any of whose employees are employed in such oeprations; and
>
> (3) the term 'United States' when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereof." 43 U.S.C. § 1333(c).

waters," no one needed "DOHSA as a remedy" any longer.[12]

As to the second question presented by this Petition, the court of appeals below permitted a recovery as a seaman under the Jones Act simply because the employee had worked as a seaman in the past,[13] even though he had not been assigned to or performed any duties on any vessel for more than two weeks prior to the accident and had been assigned to work, and had worked, for more than a week solely on a fixed platform on the outer continental shelf.[14]

12. 523 F.2d at 798. Indeed the *Law* panel in the court below concluded that this Court in *Moragne* in overruling *The Harrisburg*, 119 U.S. 199 (1886) also repealed DOHSA and affirmatively so stated:

> "It is time that the dead hand of *The Harrisburg*--whether in the courts or on the elbow of the Congressional draftsmen of DOHSA--follow the rest of the hulk to an honorable rest in the briney (sic) deep.
>
> "No longer does one need a state remedy. No longer does one need a state court, or The Admiralty as a Court, or DOHSA as a remedy." 523 F.2d at 798.

13. The Court below did so primarily on its "allegation" that the employee "spent all but a small fraction of his working time on Mobile's submersible drilling barges" during the two years immediately prior to his death. We use the term "allegation" advisedly, because the record below belies this statement. While the record lacks absolute clarity on this issue, it reflects that for the two years prior to his death, Nation was assigned to work on fixed platforms or on land 56.3% of his working time and only 43.7% of his working time was as a seaman aboard drilling vessels. The court of appeals below did not attempt to identify the "vessel" on which Nation was serving as a member of the crew at the time of his death because it could not do so. The last drilling barge to which he had been assigned was no longer under charter to Mobil, having been moved off location, released by Mobil and returned to its owner more than two weeks prior to Nation's death.

14. The district court had specifically so found on undisputed evidence: "At the time of his death on the 206A Jet Ranger Nation was employed by Mobil as a toolpusher on a stationary platform Baxter Rig No. 3. His claim to seaman's status is based on the assertion that he was temporarily on the stationary platform and that his regular employment was on submersible drilling barges owned by Mobil. How-

As to the third question presented by this Petition, the panel of the court of Appeals held that *res ipsa loquitor* was applicable as against Mobil only.

REASONS FOR GRANTING THE WRIT

I.

The holding of the court below that this Court's *Moragne* death remedy replaces the Congressional DOHSA death remedy for death occurring more than one marine league from shore is in direct and irreconcilable conflict with the decision of the Court of Appeals for the First Circuit in *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974).

The irreconcilable conflict between the two courts of appeals is demonstrated by comparing the respective holdings:

This Case (*Higginbotham*)	*Barbe*
"Although earlier reserving the question of the applicability of *Moragne* on the high seas. *In Re Dearborn Marine Serv. Inc., supra,* at 270 n. 12, a panel of this circuit has since held 'that *Moragne* applies not only to navigable waters of the	"Since DOHSA clearly provides a cause of action for wrongful death in this case, we fail to see how *Moragne* applies. We hold that the measure of damages for wrongful death provided by DOHSA, namely, 'pecuniary loss,' controls in the instant

ever, the evidence fails to identify him with any such barge except the Crestwave Topper No. 1 which was not under the control of Mobile at the time of the accident. It had been released by Mobil more than two weeks prior thereto." 357 F.Supp. 1164, 1176-1177.

This Case (*Higginbotham*)	*Barbe*
States, but to the High Seas as well, including the area defined in DOHSA,' and have accordingly awarded damages for loss of society for a death occurring beyond a marine league from shore. *Law v. Sea Drilling Co.*, 5 Cir. 1975, 510 F.2d 242, 250, *reh. denied, modified in part*, 5 Cir., 523 F. 2d 793 (1975)."[15]	case. The Supreme Court in *Moragne* stated that the recognition of a maritime wrongful death action would not 'require the fashioning of of a whole new body of federal law, but merely removes a bar to access to the existing general maritime law. 398 U. S. at 405-406, 90 S.Ct. at 1790.' Yet there is a substantial difference between removing a decisional bar like *The Harrisburg* and circumventing a statutory mandate like DOHSA."[16]

Indeed, in footnote 19, which was placed in the margin following the language quoted above from the opinion in this case, the court below specifically recognized and acknowledged this conflict with the First Circuit:

> *Contra, Barbe v. Drummond*, 1 Cir. 1974, 507 F. 2d 794, 800-02. If presented as an original matter, the members of this panel would be constrained to reach the result of the First Circuit in *Barbe*. While both *Barbe* and *Law* are undoubtedly correct in extending the right to recover for pain and suffering to deaths occurring on the high seas, the opinion in *Law* fails to distinguish between damages recoverable as survival items and as wrongful death items. Conscious pain and

15. 545 F.2d 422 at 435.

16. 507 F.2d 794 at 801.

> suffering is traditionally--and logically--a survival item. Loss of love and affection, or loss of society, on the other hand, is traditionally a wrongful death item. The members of the panel would read *Moragne* to say that DOHSA is the exclusive wrongful death remedy outside of state territorial waters. The decision in *Law*, however, forecloses this issue for the panel. 545 F.2d at 436, n. 19.[17]

It must be noted here that the *Moragne* maritime death remedy was created to provide a cause of action for death caused by the unseaworthiness of a vessel within the territorial waters of those states where the state wrongful death statutes provided a cause of action for death based only on negligence. This Court specifically limited its ultimate holding in *Moragne* to state territorial waters thusly:

> We conclude that the Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations *not covered by the Act*. (Emphasis supplied). 398 U.S. at 402.

No such *Moragne* death remedy based on unseaworthiness was or is needed in those situations covered by DOHSA simply because the courts have repeatedly held that the death remedy enacted by Congress in DOHSA permits a recovery if the death is caused by either unseaworthiness,

17. It should be noted that no petition for writ of certiorari was filed in either *Law* or *Barbe*. For analysis of *Law* and its conflict with *Barbe*, see Schill, *Moragne-Gaudet: Three If By Sea?*, 13 Hou. L. Rev. 917 (1976).

negligence or both.[18] Congress having provided for recoveries under the general maritime law for unseaworthiness and negligence in DOHSA for death on the high seas, and having fixed the damages recoverable, no court has the power to replace the statute completely as the panel of the court below did in *Law* by misconstruing this Court's decision in *Moragne*, or to amend DOHSA to award damages which Congress did not include in its statutory mandate.[19]

It is respectfully submitted that a writ of certiorari should be granted to resolve this direct conflict between the Courts of Appeals for the First and Fifth Circuits.

II.

The holding of the court below that the survivors of an employee who was assigned to work on a stationary offshore platform are entitled to recover on the basis that the decedent was a member of a crew of a vessel under the Jones Act is directly contrary to this Court's decisions in:

18. Doyle v. Albatross Tanker Corp., 367 F.2d 465 (2d Cir. 1966); Sennett v. Shell Oil Company, 325 F.Supp. 1 (E.D. La. 1971); Soileau v. Nicklos Drilling Company, 302 F.Supp. 119 (W.D. La. 1969); Chermesino v. Vessel Judith Lee Rose, Inc., 211 F.Supp. 36 (D. Mass. 1962), *aff'd.*, 317 F.2d 927 (1st Cir. 1963), *cert. denied*, 375 U.S. 931 (1963). *See*, Kernan v. American Dredging Co., 355 U.S. 426 (1958).

19. This Court has previously held that judicial views of what the law should be must not be substituted for a statute enacted by the Congress. National R.R. Passenger Corp. v. National Ass'n. of R.R. Passengers, 414 U.S. 453, 458 (1974); Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215 (1962); United States v. Monia, 317 U.S. 424 (1943); and Southern Steamship Corp. v. N.L.R.B. 316 U.S. 31, 44 (1942). The legislative history of DOHSA shows that statutory remedy was intended to be exclusive. 59 Cong. Rec. 4483 (1920).

Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969).

Senko v. Lacrosse Dredging Corp., 352 U.S. 370, 373 (1957).

Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952).

Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941).

Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334 (1953).

Nogueira v. New York, N.H. & H.R. Co., 281 U.S. 128 (1930).

In *Rodrigue* this Court held that a stationary offshore platform is not a "vessel," but rather an extension of land which comes within the scope of the Lands Act. The opinion makes it clear that employees who are assigned to such a platform are not afforded maritime remedies and the employee's exclusive remedy against his employer is the Longshoremen's and Harbor Workers' Compensation Act as extended by the Lands Act.[20] The court below completely

20. The Court of Appeals for the Fifth Circuit is in accord with *Rodrigue:* Nation v. Morris, 483 F.2d 577 (5th Cir. 1973), *cert. denied*, 414 U.S. 1071 (1973); Ross v. Mobil Oil Corp., 474 F.2d 989 (5th Cir. 1973), *cert. denied*, 414 U.S. 1012 (1973); Owens v. Diamond M Drilling Co., 487 F.2d 74 (5th Cir. 1973); De'Ville v. Wise, 470 F. 2d 1384 (5th Cir. 1973); *cert. denied*, 414 U.S. 818 (1973); Smith v. Falcon Seaboard,Inc., 463 F.2d 206 (5th Cir. 1972), *cert. denied*, 409 U.S. 1085 (1972); Keener v. Transworld Drilling Co., 468 F.2d 729; (5th Cir. 1972); Bertrand v. Forest Corp., 441 F.2d 809 (5th Cir. 1971), *cert. denied*, 404 U.S. 863 (1971).

ignored *Rodrigue*, and fashioned a new and novel rule that the work record of the employee over the preceding two-year period should be considered in determining whether he was a seaman at the time of the casualty instead of following the well established rule that his status as a member of the crew of a vessel is to be determined by his duties at the time of the casualty. The court below then held the employee Nation to be a seaman as a matter of law allegedly because (1) the employee "spent all but a small fraction of this working time on Mobil's submersible drilling barges."[21] and (2) because he was a temporary replacement for the foreman on the fixed platform.[22]

In holding that Nation's two-year work history prior to his death had to be evaluated to determine whether he was a member of the crew of a vessel entitling his beneficiaries to Jones Act benefits, the decision of the court below is in direct conflict with this Court's decisions in *Senko*,[23] *Desper*[24] and *Parker*,[25] all of which hold that an employee's remedy against his employer is to be determined by his work assignment at the time of his injury. In *Senko*, this Court held that Jones Act coverage depends "on a finding that the injured was 'an employee of the vessel, engaged in

21. Footnote 13 , *supra*, for the district court's findings on this issue.

22. 545 F.2d 422 at 433. This de novo fact finding is not only contrary to the conclusion of the district court, quoted *supra*, footnote 13 , but is also contrary to the undisputed record which shows that for the two years prior to the casualty he worked as a seaman only 43.7% of his work time on four submersible vessels and 56.3% of his work time on either fixed platforms or ashore.

23. Senko v. Lacrosse Dredging Corp., 352 U.S. 370 (1957).

24. Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952).

25. Parker v. Motor Boat Sales, Inc. 314 U.S. 244 (1941).

the course of his employment's at the time of his injury"[26] (a test which Mr. Nation could not meet since he was not assigned to or an employee of any vessel on the occasion in question). In *Desper*, this Court held that the "question whether an individual was a 'seaman' . . . depends largely on . . . the activity in which he was engaged at the time of the injury," and that the status of a Jones Act seaman did not attach to a worker by virtue of the ". . .fact that he had been, or expected in the future to be, a seaman. . ."[27]

In *Parker*, an employee hired primarily as a janitor and porter was drowned while helping test an outboard motor for his employer. The rights of his beneficiaries against his employer were determined by his work assignment on the water at the time of his accident and this Court held that the employee's ". . .habitual performance of other and different duties on land . . ." could not alter this result.[28]

Thus, the reliance by the court below on the employee's two-year work history in holding Nation to be a Jones Act seaman is clearly wrong and in direct conflict with the noted decisions of this Court as it is his assigned work at the time of his injury which is determinative.

The court below also relied on its assumption that Nation's assignment to the fixed platform was only temporary, and at some time in the future he would again be assigned to a vessel. Its reliance on the "temporary" nature of his assignment to the fixed platform is also misplaced and is directly contrary to the decisions of this Court in *O'Rourke*[29]

26. 352 U.S. 370 at 373.

27. 342 U.S. 187 at 190-191.

28. 314 U.S. 244 at 246-247.

29. Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334 (1953).

and *Nogueira*.[30] In both *O'Rourke* and *Nogueira*, this Court held that a railroad employee's remedy against his employer was to be determined by his work assignment at the time of the injury. In both cases, the railroad employee was denied his railroad worker's remedy under the Federal Employers' Liability Act, 45 U.S.C.§ 51 et seq. (hereafter FELA), and the Longshoremen's & Harbor Workers' Compensation Act was held to be his exclusive remedy only because his injury occurred while he was working on a barge on navigable waters. Both were only on a barge part of the day and performed essentially railroad duties both ashore and afloat on the day of their accidents. The "temporary" nature of their work on navigable waters did not preserve their FELA rights as railroad workers, because at the time of their injury they were within the jurisdiction of the Longshoremen's Act, even though for only a few minutes or hours on the day of their accidents. In the present case, Nation had worked a full week on the platform, and had not worked on or been assigned to work as a member of the crew of any vessel for more than two weeks prior to his accident. The holding of the court below that Nation's beneficiaries were entitled to the benefits of the Jones Act (which adopted the FELA) which holding reversed the District Court's conclusion that Nation's exclusive remedy was the Lands Act (which adopted the Longshoremen's Act) is clearly in conflict with this Court's decisions in *O'Rourke* and *Nogueira*. This Petition should be granted to resolve this conflict.

The new and novel two-year work history rule of the court below for determining Jones Act status is also directly contrary to the decisions of the following Courts of Appeals:

30. Nogueira v. New York, N.H. & H.R. Co., 281 U.S. 128 (1930).

SECOND CIRCUIT

Long Island R. Co., v. Lowe, 145 F.2d 516 (2nd Cir. 1944) in which the Court held:

> ***The employee's duties on the day of the accident are the critical facts which should determine his status as a member of the tug's crew.*** It is true that if he had been called aboard for a single act of service, he might not become a member of the crew. But on the days when his employer assigned him to serve as 'mate' of the vessel, we hold that he was a crew member, although he might cease to be one on days when he was assigned for other duties. ***We can perceive no reason in the words or purpose of the Compensation Act for lumping an employee's activities over the period of his employment and classifying him according to the greater number of days on which he was either seaman or longshoreman.*** (Emphasis supplied). 145 F.2d at 518.

FIFTH CIRCUIT

Holland v. Allied Structural Steel Co., 539 F.2d 476 (5th Cir. 1976), in which the Court held:

> Nonetheless, there remains the jurisdictional requirement that a claimant alleging seaman status under the Jones Act have been connected, in more than a transitory way, with a vessel or vessels, *and* that his injuries have arisen in the course of his duties in the service of such vessel or vessels. (Emphasis supplied). 539 F.2d at 479.

SIXTH CIRCUIT

Antus v. Interocean S.S. Co., 108 F.2d 185, 187 (6th Cir. 1939), in which the Court held:

> The fact that he had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature.

It is respectfully submitted that an employee's seaman status for Jones Act purposes must be determined by his assigned work activities at the time of his injury as this Court has previously held. To hold otherwise is to make employees seamen who are neither performing any duties in the service of a vessel nor incurring any of the risks inherent in doing a seaman's work. This has not been and should not be the law, and this Court should grant this Petition to resolve the conflict between the decision of the court below and the decisions of this Court and the other courts of appeals as demonstrated above.

III.

Both the district judge and the court of appeal found the evidence so insufficient that no probable cause of the accident could be determine.

> The district court states at A-16: "In fact, evidence is so insufficient that no actual, probable or suggestive cause of the crash [can] be determined with any degree of certainty."

and at A-20:

"These findings and observations on the evidence are not such specific conduct as could enable this court to proclaim any one or all to be a cause in fact of the crash. For the court to do so would be an exercise in speculation. The conclusion remains that the cause of the crash is unexplained.

At A-21-22

"There has been no specific negligent action or inaction on the part of Mobil to which the Court can label a contributing factor in this crash."

The trial court then went on to find "as a matter of law the doctrine of res ipsa loquitur in the light of the total effect of the evidence, affords a reasonable inference of fault and is properly applicable to the facts of this litigation." A-22.

The panel of the court of appeals in a 2-1 decision overruled *Morrison v. LeTourneau Co.*,[31](5th Cir. 1943) and affirmed the District Judge's decision that res ipsa loquitur was applicable.

In *Morrison v. Le Tourneau Co.*, the plaintiff sued both the owner and the operator of an airplane that crashed without survivors raising questions similar to those posed in these suits. The Fifth Circuit holding that res ipsa loquitor was inapplicable said:

> "The doctrine of res ipsa loquitur cannot apply in cases of this sort because there is no showing

31. Morrison v. LeTourneau Co., 138 F.2d 339 (5th Cir. 1943).

> that accidents of this very sort cannot happen to the most skillful of pilots in planes of the finest type and condition. Even if the doctrine of res ipsa loquitur were applicable, there would be the impossibility of determining the defendant against whom the rule should be applied, since the two defendants are charged with separate and distinct acts of negligence. Would the jury be permitted arbitrarily to find that because a wing broke under the circumstances the Flying School furnished a defective ship, or that the ship was negligently operated by the Le Tourneau Company? The doctrine of res ipsa loquitur does not supply the material answer that is requisite. Neither does the evidence. It was wholly impossible for the jury to have determined from the evidence, and the inferences reasonably to have been drawn therefrom, either that the ship was defective or that it was negligently operated by Le Tourneau. If the proven facts give equal support to each of two inconsistent inferences, then neither is established, and 'judgement, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover'." 138 F.2d at 341.

To overcome *Morrison v. Le Tourneau* the court of appeals found that air crashes no longer "ordinarily occur" without negligence of the operator. A-72.

As Judge Gee observed in his dissent, the majority made this finding although:

> "The opinion of the court below attempts no factfindings about whether at the present time

airplane accidents in general ordinarily occur without negligence; moreover, the record contains nothing approaching the comprehensive evidence of a general nature sufficient to support such a conclusion." A-91

CONCLUSION

This petition calls for authoritative clarification of the important questions presented and resolution of the conflict between the respective courts of appeals and the decisions of this Court. It is respectfully submitted that certiorari should be granted.

Respectfully submitted,

CARL J. SCHUMACHER, JR.
1106 Arabella Street
New Orleans, La. 70115
(504) 899-8904

Attorney for Petitioner,
Mobil Oil Corporation

Of Counsel
Charles C. Gray
P.O. Box 900
Dallas, Texas 75221
(214) 658-3348

CERTIFICATE OF SERVICE

The undersigned counsel for petitioner has caused three copies of the foregoing Petition for Writ of Certiorari to be served on Jack Benjamin, 1718 NBC Building, New Orleans, La., 70112; Jack Caldwell, 519 Main Street, P.O. Box 592, Franklin, La., 70538; Messrs. Christovich & Kearney, American Bank Building, New Orleans, La., 70130; Messrs. Thompson & Sellers, P.O. Box 308, 112 South Louisiana Ave., Abbeville, La., 70510 and I. P. Saal, Jr., P.O. Box 176, Gueydan, Louisiana, by placing in the U.S. Mails, first class postage prepaid, this the 2nd day of June, 1977.

CARL J. SCHUMACHER, JR.

APPENDIX A

OPINION OF DISTRICT COURT

FILED: April 20, 1973

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
OPELOUSAS DIVISION

Civil Action No. 13,954

MRS. FRANCIS NELL HIGGINBOTHAM ADMX. ETC.
OF MARSHALL K. HIGGINBOTHAM, DECEASED, ETC.

versus

MOBIL OIL CORPORATION, ET AL

* * * * *

Civil Action No. 13,958

MRS. WANDA MOORE LONG, ADMX. of EST. OF
DECEASED JOSEPH C. LONG, JR., ETC.

versus

BELL HELICOPTER CO., ETC. ET AL

* * * * *

Civil Action No. 15,316

JEANETTE LEBLANC NATION, PERSONAL REPRESENTATIVE FOR ELLA MENARD NATION AND ROY GLEN NATION

versus

TEXTRON INDUSTRIES, INC., ETC. ET AL.

* * * * *

Civil Action No. 15,326

MRS. ARLINE J. SHINN, IND., ETC.

versus

MOBIL OIL CORPORATION

* * * * *

(Consolidated Cases)

FOR PLAINTIFFS:	MESSRS.
Mrs. Nell Higginbotham Mrs. Jeanette LeBlanc Nations	Charles M. Thompson, Jr. 112 S. Louisiana Avenue Abbeville, Louisiana 70510
Mrs. Wanda Moore Long	Jack C. Caldwell Aycock, Horne, Caldwell & Coleman 519 Main Street Franklin, Louisiana 70538

Mrs. Arline J. Shinn	Jack C. Benjamin Kierr & Gainsburgh Suite 1718 National Bank of Commerce Building New Orleans, Louisiana 70112

FOR THIRD PARTY PLAINTIFF:

Mobil Oil Corporation	Carl J. Schumacher and Robert Badger Lemle, Kelleher, Kohlmeyer, Mathews & Schumacher 1800 National Bank of Commerce Bldg. New Orleans, Louisiana 70112

FOR DEFENDANTS:

Mobil Oil Corporation	Carl J. Schumacher and Robert Badger Lemle, Kelleher, Kohlmeyer, Mathews & Schumacher 1800 National Bank of Commerce Bldg. New Orleans, Louisiana 70112
Bell Helicopter Company Bell Aerospace Corporation	Richard R. Christovich and C. Edgar Clouthier

Christovich & Kearney
Room 1815,
American Bank Building
New Orleans, Louisiana
70112

James F. Fitzsimons
Mendez & Mont
New York, New York

NAUMAN S. SCOTT, JUDGE

SCOTT, JUDGE:

These four actions were brought by the representatives of the pilot, Joseph Clyde Long, Jr. (Long), and three passengers, Marshall K. Higginbotham (Higginbotham), James Lex Shinn (Shinn) and James E. Nation (Nation), of a helicopter which crashed on August 15, 1967 in the Gulf of Mexico about 100 miles south of Morgan City, Louisiana. The aircraft was a Bell helicopter, Model 206A Jet Ranger, Serial No. 46 (the 46th such craft sold by Bell) bearing the official registration number N7846S. The aircraft was only two months old at the time of the crash, having been purchased by Mobil Oil Corporation (Mobil) from Bell Helicopter Company (Bell) on June 6, 1967. It had been flown a total of 165 hours and 45 minutes. Bell was the manufacturer and Mobil was the owner and operator of the helicopter. The pilot Long, an employee of Mobil, had left Morgan City at approximately 1:50 P.M. with Shinn and other passengers whom he dropped at Baxter Rig No. 3 where he had picked up the two other passengers Higginbotham and Nation. The aircraft took off from Baxter Rig No. 3 between 3:30 and 4:00 o'clock in the afternoon

and simply disappeared without trace of the aircraft or its passengers except a small portion of the aircraft recovered later that afternoon, including the bottom part of the cabin with the pontoons attached and that portion of the tailboom located in the rear of the horizonal stabilizer. The helicopter crashed between one and three miles from the site of takeoff.

Mrs. Frances Nell Higginbotham and Jeanette LeBlanc Nation, representatives of Higginbotham and Nation respectively, instituted their actions against Bell and Mobil. In both cases Mobil filed cross-claims against Bell seeking indemnification and/or contribution for all liability adjudged against Mobil, indemnity for all benefits paid under the Longshoremen and Harbor Workers Compensation Act and recovery for the loss of its aircraft.

Mrs. Arline J. Shinn, the representative of Shinn, filed her complaint (amended) against Mobil and Bell, and Mobil filed a third party demand against Bell similar to that filed by it in the other two suits.

Mrs. Wanda Moore Long filed her action against Bell. Mobil is not a party to this action. The four actions were consolidated for trial.

The accident occurred on high seas over the outer continental shelf in the Gulf of Mexico far outside the boundaries of the State of Louisiana, and those satisfies the traditional locality test of jurisdiction, *The Plymouth*, 70 U.S. (3 Wall) 20, 18 L.Ed. 125 (1866). The fated helicopter was owned and operated by Mobil in conjunction with its extensive offshore activities, and, at the time of the fatal accident, was performing the ordinary functions of a

crewboat. Unquestionably it was engaged in maritime activity and was not operating as a "land-based aircraft between points within the continental United States." *Executive Jet Aviation v. Cleveland,* U.S. , 34 L.Ed. 2d 454, 93 S.Ct. (1972). We have jurisdiction.

The liability of Bell, whether under the Death on the High Seas Act, the General Maritime Law, or the Laws of Texas or Louisiana, should first be considered as an issue of fact. The primary contention of plaintiffs and Mobil against Bell is that the tailboom of the N7846S completely separated from the remainder of the aircraft while in flight. The contention is that this separation occurred just aft of the horizonal stabilizer (the forward end of that portion of the tailcone identified as "Plaintiffs' Exhibit P-1"). As a result, the aircraft became uncontrollable and subsequently crashed into the Gulf of Mexico. Plaintiffs and Mobil further contend that Bell was negligent in designing and manufacturing a faulty product without adequate testing procedures and that this negligence on the part of Bell was the sole and proximate cause of the accident. Specifically, plaintiffs and Mobil advance and attempt to support the theory that a fatigue crack (or cracks) originating in the lower left quadrant (looking aft) of the 360° fracture on the forward end of Exhibit P-1, propagated in fatigue approximately four inches to a point at which the loads existing on the tailboom accelerated the propagation of the fracture which continued in tension resulting in complete separation. There is no dispute that the entire remaining circumference of the fracture on the forward end of P-1, save the approximate four inches mentioned above, failed in tension as opposed to fatigue. There is no disagreement that the tension portion of this fracture occurred relatively instantaneously, whether from loads in flight or loads which

would occur upon striking the water. However, Bell disputes the existence of any fatigue fracture at all, and there is disagreement as to what effect the four or five inch crack (the alleged fatigue fracture above referred to) in this area of the tailboom would have on the ability of the boom to withstand the loads in experiences in flight operations over a period of several hours. Plaintiffs and Mobil offered no other contentions as to the direct cause of the disaster other than the separation of the portion of the tailboom in flight.

In determining this question of fact, the Court must rely on the testimony of experts who were most eminently qualified by education, training and experience. We have given due consideration to the comparative qualities of each of these experts; to their connections with the parties; to the extent and detail of the examinations conducted by each, and to the fact that very little (absolutely none of the main power and control units or instrument panel, no flight plan, no communication, no performance record, taped or otherwise) of the aircraft remained and was avilable for analysis. To this degree any conclusion of the court or the experts is suspect. Although the failure-in-flight theory is novel, part of the explanation for this is the fact that the magnesium monocoque tailboom structure itself was novel and had been marketed commercialy by Bell for a period of only about eight months prior to the accident of August 15, 1967. We find, under the circumstances, that the case of plaintiffs and Mobil against Bell hinges entirely on the validity of its metallurgists experts, Adams and Stewart; that the testimony of their other witnesses is principally corroborative and must fall if the metallurgists have failed to establish that the fracture at the forward end of Exhibit P-1 commenced in fatigue and propagated within a minute or so to complete failure. In addition to the considerations noted above we have endeavored to determine whether the

theory of these two metallurgists Adams and Stewart, is supported by other evidence in the case. For this purpose we have addressed ourselves principally to the forward edge of P-1 and have kept this exhibit before us at all times during our examination of the testimony.

It is conceded by all parties that magnesium alloy is relatively more sensitive to corrosion that most aluminum alloys when brought into contact with salt water and that the fracture surface on the forward edge of Exhibit P-1 was in fact corroded. Both of plaintiffs' metallurgy witnesses testified that the corrosion was advanced to a point to which it would obliterate the "classic characteristics" of fatigue type failure. The surface was however sufficiently preserved in order to show conclusively, according to all experts, that tensil type fractures clearly existed in the circumference from 8:00 o'clock clockwise to 5:00 o'clock, looking aft at Exhibit P-1 while it is in an upright position.[1]

Having determined that the "classic characteristics" of fatigue fracture had been obliterated, plaintiffs' (and Mobil's) experts turned to less certain indicators. They were able to locate an area of relatively straight fracture which apparently can be indicative of fatigue failure. This is the area omitted from the reference to the tension fracture area mentioned above and extends from 5:00 o'clock clockwise to 8:00 o'clock. In portions of this questioned area there appeared a definite valley in about the center of the fracture face, running parallel to the lines formed by the outside edges of the fracture. Plaintiffs' (and Mobil's) metallurgy experts testified that such a formation was not found in tension fractures of sheetmetal material. Witness Stewart advanced the theory that the valley was caused by two separately occurring fatigue cracks, one on each side of the sheet metal, moving toward the center at an angle and converging to form an indentation.

1 . As to the area from 5:00 o'clock clockwise to 8:00 o'clock, all of Bell's experts were of the opinion that this too was clearly fractured in tension. Bell's experts were of the opinion that the entire 360° fracture was in tension. Plaintiffs' metallurgical experts are not in entire agreement as to the extent of the fatigue fracture. One contended that it extended from 6:00 o'clock clockwise to approximately 8:00 o'clock. The other was of the opinion that the fracture began at a stress riser (rivet hole) near 5:00 o'clock and extended clockwise to a point between 7:00 and 8:00 o'clock. These areas overlap approximately four inches.

The contention that a valley formation of this sort does not occur in tension type fractures was disputed by Bell's experts. Samples were cut from the tailboom of N7846S and placed in a device which applied loads to either end of the strip in opposite directions. These loads were increased until fracture occurred. In several of these samples there was a formation of a very sharply defined V-type valley on one portion of the broken strip and a corresponding pointed ridge on the other portion of the strip. Thus it was clearly demonstrated that such a formation can occur in a tension type break of sheet metal of the type of which this tailboom was constructed.

Plaintiffs' (and Mobil's) witness Stewart cut a sample from the fracture surface of Exhibit P-1 at approximately 6:00 o'clock. This sample was taken within that portion of the fracture which plaintiffs and Mobil contend was a result of fatigue. The sample was examined in detail at various degrees of magnification up to approximately 1400 times its actual size. From this examination the witness testified that he observed no distortion of the grains in the form of elongation and bending at the fracture surface which is normally associated with tension type fractures and also

that he did not find evidence of any "necking down" near the point where the fracture occurred. This so called "necking down" is a normal characteristic of a tensil type fracture of a malleable metal. These findings were the basis of his opinion that there was a fatigue type failure in the fracture surface at the forward edge of Exhibit P-1 originating at approximately 8:00 o'clock (where no stress riser was apparent) and propagating counter-clockwise to approximately 6:00 o'clock, with a very short area of tension type break sandwiched in between. Plaintiffs' (and Mobil's) other metallurgical expert, Adams, was highly qualified but did not make a very extensive study of the fracture. He agreed in general with the findings of witness Stewart. However, the fatigue fracture originated, in his opinion, at a point between 5:30 and 6:00 o'clock in an area where the fractured cell passed through a rivet hole and extended clockwise to a point somewhat short of 8:00 o'clock.

Bell's experts testified that any so called "necking down" which they agree occurred in tensil type breaks of malleable metals, could in fact be very subtle depending on the characteristics of the individual alloy and that no appreciable necking down would appear in a sheetmetal approximately .040 inches thick as is the case here. There was no more evidence of "necking down" in the area which admittedly failed in tension than there was in the area which plaintiffs' and (Mobil's) experts suggest failed in fatigue. Stewart's examination of a sample disclosing no elongation or distortion of grains of the metal itself was meaningless where admittedly there was no standard for comparison examined by witness Stewart, no known fractured surface in magnesium sheetmetal .040 inches thick which failed in fatigue was viewed by him under similar degree of magnification. Thus there was no basis for his opinion that the grains as he

saw them were not sufficiently distorted to indicate tensil type fracture. In contrast to this evidence, Dr. Wiseman made an extended and detailed examination, chemically cleansed corrosion from a sample taken from another portion of Exhibit P-1 fracture surface and took photographs through an electron microscope (magnified 2,600 to 1) of the surfaces and offered textbooks, photographs and examples together with complete explanations indicating exactly how tension type failures would appear under the magnification at which he took his photographs as opposed to how fatigue type failures would appear under the same magnification. Dr. Wiseman also advanced the theory of how the valley type formation could occur in tensil type breaks. This theory was apparently born out by the valley type formations which occurred in some of the tensil type tests conducted on this alloy.

In considering the evidence of these experts we are not unmindful of the fact that Bell's experts, with the exception of Dr. Wiseman, were its own employees, nor are we unmindful of our lack of expertise in this area. We have considered these opinions in conjunction with other evidence in the case principally Exhibit P-1 which has been physically exposed before us throughout our examination of this testimony. The thrust of the testimony of plaintiffs' (and Mobil's) experts is to the effect that a fatigue fracture propagated rapidly about four inches to a point where an intolerable stress load of compression at the top and tension around the remaining surface of the tear resulting in an almost instantaneous completion of the fracture and separation of the tailboom from the rest of the aircraft. The forward edge of P-1 refutes this theory. The compressed area at the top of Exhibit P-1 is approximately seven inches wide

and three inches deep at an angle of about 40°.[2] This area of compression is noted in the testimony of plaintiffs' experts. However, the existence of this area of compression tends to dispute rather than support plaintiffs' (and Mobil's) theory, especially when the adjacent areas of compression on the face of Exhibit P-1 are considered. If, as plaintiffs (and Mobil) contend, the tension fracture propagated from the ends of the alleged fatigue fracture, the principal force was extension, a tearing apart, to complete fracture. An examination of the forward edge of P-1 confirms that the tensil force exerted in that area was not one of extension, but of compression as would be exerted when forward movement of the aircraft was arrested on contact with surface of the water. Thus the area from about 10:30 to 11:30 is in compression in excess of 90° and overlaps the first named compression area to a considerable degree because of a tear behind the compression. The area from about 8:30 to 10:30 is in compression at about 90° and there are tears behind the compression at both the lower and upper extremities of this area. The area from about 1:00 to 3:00 o'clock is in compression about 30° . There is an area of compression between 2:30 and 3:30 (overlapping the immediately above mentioned area) of about 50° with a fracture behind the compression at both the upper and lower ends.

There is an area of compression of about 45° from 4:00 o'clock to 5:00 o'clock in the forward edge of Exhibit P-1 and a tear along the front edge of this area which continues behind and approximately parallel to the main tear to approximately 6:00 o'clock. This evidence is certainly not

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2. The degrees of compression mentioned herein refer to a bending of so many degrees from the original straight (180°) longitudinal plane of the original structure of the monocoque tailboom looking aft.

consistent with the theory that the tailboom was pulled apart by tension up to an area of compression at the top. On the contrary it indicates to us that practically the entire fracture occurred in compression. Severe compression of this type could not occur in an area extending clockwise from 9:00 o'clock to 4:30 unless in the area between 4:30 and 9:00 o'clock was intact or unless the compressions were produced by impact as in the case of the aircraft striking the water. All of the mentioned tears have remained in position as cracks as if made by compression and are not pulled apart in extension as might be the case if fractured in tension. These cracks progress clockwise and counter-clockwise and could not have occurred if the principal fracture had propagated progressively from each end of the alleged fatigue fracture.

In addition to the above we have considered the fact that fatigue failures occur as a result of oscillatory loading and from the evidence presented it appeared that such failure does not occur instantaneously. As to the exact propagation rate of a fatigue crack in this particular metal at this particular location on the tailboom under the particular conditions to which it is subjected on August 15, 1967, there was no evidence on which to base a definite determination. Defendants' experts were unanimous in their opinion that such fractures propagated very slowly, are easily discernible and should be detected by any routine inspection. This conclusion was denied but not really refuted by plaintiffs' experts. Adams, plaintiffs' (and Mobil's) most qualified metallurgist, stated as follows:

> "Now the growth of the crack is a very slow process in which each application of load, as was

> testified to yesterday, each application of load causes the crack to propagate a little bit. It is a stop-and-go type of thing. Between load applications, the limit of the crack is standing still. During load applications, it moves a little bit further." (Tr. pp. 755-756).

Plaintiffs and Mobil introduced thirteen customer service orders sent in to Bell by its Field Representatives from February 1, 1967 thru September 15, 1968 disclosing the occurrence of cracks in various parts of the magnesium monocoque tailbooms of other 206A Jet Ranger Helicopters then in the field. In all of these cases the cracks had propagated at such a slow rate as to allow discovery on routine daily examination and inspection as was maintained by Mobil.

No less than four of Bell witnesses qualified in metallurgy in the operational experience of magnesium monocoque tailbooms were of the definite opinion that if there were no cracks in the tailboom of the N7846S at 1:50 P.M. on the date of the accident and if this aircraft were in operation until approximately 3:30 or 4:00 P.M. that no such crack would possibly nucleate, propagate and go to complete failure during that short period. The inspection at early morning and the inspection by Long and the mechanic just prior to takeoff at 1:50 P.M. have been fixed by Mobil witnesses. The fact that there was no existing crack in the tailboom in the area immediately in the rear of the horizonal stabilizer in the lower left hand quadrant looking aft was established by the fact that Mobil was aware that some of the 206A Bell Jet Rangers were experiencing fatigue cracks in various areas of the tailboom. Because of this notice the mechanics and pilots were "religiously" inspect-

ing the tailboom area for any signs of cracking. The area where this crack would have had to originate according to plaintiffs' metallurgical experts would have been in clear view and discoverable upon inspection. We find that the evidence clearly establishes that the fracture alleged by plaintiffs' (and Mobil's) expert witnesses could not have nucleated, propagated and gone to complete failure during that short period.

Bell has described the fractures referred to in the customer service orders as maintenance nuisance, and handled them as such. The record supports this conclusion. Its customers without exception handled them as a maintenance nuisance. The monocoque tailboom (aluminum) is certainly an accepted commodity on the present market. Petroleum Helicopters, Inc. was operating more than seventy of such aircraft at the time of the trial. Of the thirteen aircraft with magnesium booms referred to in the customers service orders, not one was grounded, not one crashed.

The stability of the magnesium monocoque tailboom is demonstrated by the Bell 206A Jet Ranger belonging to ERA. Photographs of the tailboom of this aircraft are in the record and it was the subject of a customer service order dated August 22, 1968. This craft operated despite a crack which ran more than 180° around the circumference of the tailboom. The remaining unfractured metal of this 206A tailboom was sufficient to withstand the loads applied in the operating of that helicopter.

All the rest of the evidence regarding the liability of Bell is predicated upon the proof of an occurrence of a fatigue fracture in the tailboom of the N7846S. The testimony of plaintiffs' (and Mobil's) owne witnesses establishes that

there was no such fracture existed at 1:50 P.M. on the day of the accident. There is no evidence to indicate the existence of such a fracture thereafter, except the disputed conclusions of the two metallurgists called by plaintiffs and Mobil. Their conclusions are not supported by the other evidence in the case. They are disputed by Bell's witnesses and refuted by the physical evidence above referred to. The evidence does not establish that a fatigue fracture occurred in the tailboom of the N7846S or that the tailboom became separated from the helicopter in flight prior to the accident of August 15, 1967.

The claims against Bell as manufacturer made by the plaintiffs and the third party plaintiff must fall without evidence to support a conclusion that any factor of design or manufacturing technique caused or contributed to the uncontrolled descent of the helicopter. Bell had neither the management of nor control over the operation or maintenance of the unit once it was delivered to Mobil.

The evidence is not sufficient to establish that an inflight separation of the tailboom caused the crash of Mobil's Jet Ranger. In fact, evidence is so insufficient that no actual, probable or suggestive cause of the crash cannot be determined with any degree of certainty.

The focus of attention must turn to a determination of liability, if any, on the part of the only remaining defendant, Mobil, the owner and operator of the 206A Jet Ranger.

The plaintiffs seeking recovery from Mobil have, in addition to listed specific acts of negligence, sought to invoke, either by clear implication or by actual pleading, the doc-

trine of res ipsa loquitur. This doctrine unquestionably has application in a cause of action arising in admiralty, either under the Jones Act or under the General Maritime Law. *American Commercial Lines, Inc. v. Silver Creek Coal Co.*, 393 F.2d 178 (7th Cir. 1968), held as follows:

> "Appellant argues that it is entitled to recover under the doctrine of res ipsa loquitur. Unquestionably that doctrine has application in admiralty. Johnson v. United States, 333 U.S. 46, 68 S. Ct. 391, 92 L.Ed. 468 (1948); United Fruit Company v. Marine Terminals Corporation, 9 Cir., 376 F. 2d 1007 (1967); Logan Charter Service, Inc. v. Cargill, Inc., 8 Cir., 373 F.2d 54 (1967). However, "res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient ***.' Sweeney v. Erving, 228 U.S. 233, 240, 33 S.Ct. 416, 418, 57 L.Ed. 815 (1913). And see Johnson v. United States, supra; United Fruit Company v. Marine Terminals Corporation, supra. Even if the doctrine were applicable, the court's findings are not clearly erroneous, particularly in light of the direct evidence of proper unloading by appellee."

See also Johnson v. United States, 333 U.S. 46, 68 S.Ct. 391, 92 L.Ed. 468 (1948); *United Fruit Co. v. Marine Terminal Corporation*, 376 F.2d 1007 (9th Cir. 1967); *Logan Charter Service, Inc. v. Cargill, Inc.*, 373 F.2d 54 (8th Cir. 1967).

There appears little doubt that the jurisprudence developed on this doctrine has been applied to actions involving aircraft accidents. *Cox v. Northwest Airlines, Inc.*, 379 F. 2d 893 (7th Cir. 1967).

In *Cox* the District Court was unable to identify any specific conduct on the part of the defendant which constituted negligence and which was a proximate cause of the disaster, but in reviewing the findings of fact and conclusions of law filed by the District Court, the 7th Circuit affirmed, saying:

> "We are of the opinion that the Court properly applied the doctrine of res ipsa loquitur and that its findings of negligence was a permissible one . ." Cox v. Northwest Airlines, Inc., supra, p. 895).

Although not completely determinative of either liability or causation, the Court feels that some subsidiary findings of fact should be made as a backdrop for the ultimate conclusions.

From the testimony of both the men on the Baxter rig from which the helicopter departed and from the testimony of the pilot who spotted the wreckage, it appears that the weather at the time of the crash and shortly thereafter was overcast with a very light rain falling. Seas in the area were whitecapped at about three to five feet. Mr. Bodin, a workman on board the Baxter rig present when the Jet Ranger made its last takeoff, stated that in his experience helicopters did not routinely move about in the offshore fields in such drizzles. Although there exists a certain amount of doubt as to the extent of the light rain, there is no question in the Court's mind that it was not a "nice, warm, sunny

day" at the location of the crash.

Inasmuch as Mobil performed its own maintenance on the 206A, the extent and quality of their program was deeply explored. The chief pilot and mechanics supervisor for Mobil, Mr. Rhodes, testified that he had personally flown this particular 206A on the morning of the crash, and at that time he had no indication of any problem or potential problem with the aircraft. When Rhodes last saw the aircraft it was being inspected by Mr. Long, the pilot, and a mechanic. In addition, he stated he had personally inspected the craft on that date and found nothing wrong with the Jet Ranger. This inspection included a "religious" inspection of the tailboom in the area of the horizonal stabilizer. The detailed inspection of this area had for its purpose the detection of cracks in the magnesium skin. Rhodes stated that his company had heard of some tailboom cracking on this model helicopter experienced by Petroleum Helicopters, Inc. As a result of this knowledge extra care was being taken to check this area.

Much of the testimony regarding the strict maintenance procedures is disputed by the information shown on the mechanics' worksheets. According to these records, untrained mechanics were servicing the helicopters prior to the accident of August 15. The pilot trip reports are not creditable. If the information on these trip reports was accepted as true, it would show that this helicopter was habitually flown "over the red line" and at speeds substantially over the "VNE" (velocity never to exceed) limit for this model.

From the evidence presented it appeared that Joseph C. Long, the pilot, had a propensity for flying at extremely

altitudes, that is, under 25 feet. This fact was brought out by testimony of men who had flown with Long in the past. Prior to his employment with Mobil, Long had occasion to crash a helicopter owned by his then employer, Petroleum Helicopters, Inc. In that crash it seems that Long was chasing ducks with the helicopter at extremely low altitude when some ducks went through the bubble of the helicopter causing it to crash. Long and his passengers walked away from that incident.

There is no definite proof, and in fact nothing short of pure speculation as to the altitude of the 206A Jet Ranger at the onset of its uncontrolled descent.

These findings and observations on the evidence are not such specific conduct as could enable this Court to proclaim any one or all to be a cause in fact of the crash. For the Court to do so would be an exercise in speculation. The conclusion remains that the cause of the crash is unexplained.

> "The appellant recognizes that the doctrine of res ipsa loquitur may properly have application in actions involving airline accidents. But the appellant contends that in the instant case it was error to apply that doctrine in resolving the issue of liability because there is substantial proof of the exercise of due care by the appellant and no countervailing evidence of specific negligence or even of unusual circumstances. Appellant urges that evidence of due care on its part precludes any inference of negligence arising from the occurrence in the absence of at least minimal supporting evidence and, therefore, libellant has not

> sustained the burden of proof requisite to an ultimate finding of negligence and has failed to prove her case by a preponderance of the evidence.
>
> The evidence of due care to which appellant alludes concerns its maintenance records and procedures with respect to the aircraft involved; the qualified and certified status, and the competence, of the operating personnel of the aircraft and of the dispatcher; the safety training received by the crew; and the evidence that the flight was properly dispatched and the weather normal.
>
> There is no evidence as to the cause of the aircraft's crash into the ocean or concerning what happened to affect the operation of the aircraft during the period following 11:07 A.M. and prior to the crash. In the absence of such evidence, the probative value of appellant's general evidence of due care is not of substantial import. Whether due care was exercised by the operating personnel of the aircraft in the face of whatever occurred to affect the operation of the aircraft can be appraised only in the light of knowledge of what that occurrence was, whether human or mechanical failure or some other incident, and of what if anything was or could have been done about it." Cox v. Northwest Airlines, supra, p. 895).

The doctrine of res ipsa loquitur affords an inference that there was in fact some negligence simply from the occurrence of an unexpected and out of the ordinary event. There has been no specific negligent action or inaction on

the part of Mobil to which the Court can label a contributing factor in this crash.

Mobil had the exclusive control and management of the instrumentality. Such incidents as this crash do not ordinarily occur in the absence of negligence. There is no evidence that any action on the part of Marshall K. Higginbotham, J. L. Shinn or James E. Nation contributed in any manner to the unexplained crash.

The Court finds as a matter of law that the doctrine of res ipsa loquitur in the light of the total effect of the evidence, affords a reasonable inference of fault and is properly applicable to the facts of this litigation.

No claim has been made by the representatives of Joseph C. Long, Jr., the pilot, against his employer, Mobil. There remains, in view of the preceding conclusions, the task of identifying the legal status of the three passengers who lost their lives and determining the law which must govern the recovery, if any, due their survivors.

MARSHALL K. HIGGINBOTHAM

Marshall K. Higginbotham was a toolpusher for Baxter Drilling Company on a submersible drilling barge. He was not employed by Mobil and had only the status of an invitee on Mobil's 206A Jet Ranger at the time of the fatal accident on August 15, 1967. Recovery is sought by his wife and minor daughter under the General Maritime Law, Death on the High Seas Act, 46 U.S.C. 761 et seq., and the Louisiana Wrongful Dealth Act, La. Civ. Code Art. 2315.

The fatal accident occurred on the high seas covering the

Outer Continental Shelf approximately 100 miles off the coast of Louisiana. There is no question of Mobil's liability under the Death on the High Seas Act, *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967), *cert. denied* 389 U.S. 1044, 19 L.Ed. 836, 88 S. Ct. 788, and *Dugas v. National Aircraft Corporation*, 438 F.2d 324 (D.C. Pa. 1970).

Mobil is also liable under the General Maritime Law. Mobil's Jet Ranger No. 46 was utilized primarily to serve Mobil's offshore oil and gas operations. It was engaged in such services on the day of the accident, performing the mission of a crewboat in transferring passengers, etc. between the shore and several offshore rigs. The Jet Ranger was engaged in maritime activity at the time of the accident of August 15, 1967, *Executive Jet Aviation v. Cleveland*, *supra*, and a remedy is found in Maritime Law for injuries or death resulting therefrom. *Kermarec v. Compagne Genereale Transatlantique*, 358 U.S. 625, 3 L.Ed.2d 550, 79 S.Ct. 406 (1959), *Moragne v. United States Line, Inc.*, 398 U.S. 375, 26 L.Ed. 2d 39, 90 S.Ct. 1772 (1970). There is dicta in several cases indicating that the wrongful death remedy outlined in *Moragne*, *supra*, might be limited to state territorial waters and that D.O.H.S.A. preempts the field outside that area. *Canal Barge Co., Inc. v. Griffin*, —F.2d— (5th Cir. 1973). However, the language of *Moragne*, *supra*, itself clearly establishes that the action of wrongful death exists in General Maritime Law and there is no indication (even though the accident in that case occurred in the territorial waters of Florida) that the remedy is limited to the territorial waters of the states. The Court stated specifically that the primary source of confusion was not *The Tungus v. Skovgaard*, 358 U.S. 588, 3 L.Ed. 2d 524, 79 S.Ct. 503 (1959), which utilized applicable state wrong-

ful death statutes insuch waters, but *The Harrisburg*, 119 S. 199, 30 L.Ed. 358, 7 S. Ct. 140 (1886), which held that no action for wrongful death existed in the General Maritime Law:

> "The extent of the role to be played by state law under The Tungus has been the subject of substantial debate and uncertainty in this Court, see Hess v. United States, 361 U.S. 314, 4 L.Ed. 2d 305, 80 S.Ct. 341 (1960); Goett v. Union Carbide Corp., 361 U.S.340, 4 L.Ed.2d 341,80 S.Ct. 537 (1960) with opinions on both sides of the question acknowledging the shortcomings in the present law. See 361 U.S.,at 314-315, 338-339, 4 L.Ed. 2d at 305, 308, 321, 80 S.Ct. 341. On fresh consideration of the entire subject, we have concluded that the primary source of the confusion is not to be found in The Tungus, but in The Harrisburg, and that the latter decision, somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime law that it should no longer be followed."

See also *Sennett v. Shell Oil Co.*, 325 F.Supp 1 (E.D. La. 1971).

The claim under the provisions of Louisiana Civil Code Article 2315 is denied. *Sennett v. Shell Oil Co., supra, In Re Farrell Lines, Incorporated*, 337 F.2d 91 (E.D. La. 1971). Thus the representatives of Higginbotham are entitled to recover under the General Maritime Law and under the Death on the High Seas Act.

JAMES L. SHINN

The representatives of Shinn seek recovery under the Jones Act, Death on the High Seas Act, the General Maritime Law and the Laws of Texas. Their claim under Texas law is dismissed since this claim was directed against defendant Bell who has been dismissed.

Shinn was an employee of Mobil and a toolpusher on one of its drilling barges. Mobil has stipulated that he was a member of the crew of that vessel but contests his seaman's status on the ground that he was not in the service of a vessel at the time of his death. We find that Mobil's contention is not sustained by the evidence. Mobil's barge on which Shinn served as a toolpusher was located some 100 miles at sea. Mobil does not pretend that Shinn was to transport himself to or from the rig. It is undisputed that Mobil's personnel were transported to and from the rigs by Mobil and that Mobil assumed the duty to provide such transportation to Shinn. Mobil did in fact control, own and provide such transportation, namely, Mobil's illfated 206A Jet Ranger, when Shinn met his death. During this transportation phase of his employment, Shinn was clearly "in the course of his employment" so as to render Mobil liable under the Jones Act. *Hopson v. Texaco, Inc.*, 86 S.Ct. 765, 383 U.S. 262, 15 L.Ed. 2d 740 (1966). See also *Comment*, 46 *Tul. L. Rev.* 877 (1972).

Shinn's death gives rise to a cause of action under the Death on the High Seas Act as well as the Jones Act. The valid claim by Jones Act plaintiffs will not affect the legality of the claim by plaintiffs under D.O.H.S.A. *Doyle v.*

Albatross Tanker Corp., 260 F.Supp 303, *aff'd*, 367 F.2d 465 (N.Y. 1965). *Gvittsman v. Weston King Co.*, 263 F. Supp 633 (Cal. 1967); *Petition of Risdale & Anderson, Inc.*, 291 F.Supp. 353 (Mass. 1968).

The next question is whether the Shinn plaintffs can sue his employer, Mobil, under the General Maritime Law.

The Oceola, 189 U.S. 158, 47 L.Ed. 760, 23 S.Ct. 483, 23 S.Ct. 483 (1903) has been cited universally as authority for the doctrine that a seaman may not sue his employer under the General Maritime Law for injuries resulting from the employer's negligence as distinguished from unseaworthiness. This case established the so-called void which was filled later by the passage of the Jones Act. But the holding is not so broad as generally imagined.

The doctrine of *The Oceola* finds its basis in the fellow servant rule and should be restricted to instances in which a member of the crew of the vessel is injured by the negligence of another crew member of the same ship. The court in *The Oceola* declared:

> "Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:
>
> 1. . . . (maintenance and cure) . . . .
>
> 2. . . . (unseaworthiness) . . . .
>
> 3. That all the members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure.
>
> 4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

Shinn was not the fellow servant of every worker in the Gulf employed by Mobil. Certainly he was not the fellow servant of Nation or Long who were also employees of Mobil. Shinn was Mobil's toolpusher on the Pinrod Drilling Barge 50 and his fellow servants consisted of the crew of that drilling barge. The 206A Jet Ranger was performing services ordinarily performed by a crewboat and Shinn had no identification whatsoever with the Ranger. Under the circumstances, neither Long, Higginbotham nor Nation was a fellow servant of Shinn. Since the prohibition of *The Oceola* does not apply, there is a cause of action under the General Maritime Law.

Shinn's remedies under the Jones Act are not exclusive. His collateral remedy at Maritime Law may be had where appropriate as in the traditional instance of unseaworthiness. *Moragne, supra; Sennett, supra.* We therefore find that in addition to having an action under the Jones Act, the representatives of Shinn also have a cause of action under the General Maritime Law and under the Death on the High Seas Act.

JAMES E. NATION

The representatives of Nation seek to recover under La. Civ. Code Art. 2315, the Death on the High Seas Act, the Jones Act and the General Maritime Law. We find that Nation's exclusive remedy against his employer, Mobil, is the Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. 901 *et seq.* This coverage applies to him under the provisions of the Outer Continental Shelf Lands Act, 43 U.S.C. 1333(c).

At the time of his death on the 206A Jet Ranger Nation was employed by Mobil as a toolpusher on a stationary platform Baxter Rig No. 3. His claim to seaman's status is based on the assertion that he was temporarily on the stationary platform and that his regular employment was on submersible drilling barges owned by Mobil. However, the evidence fails to identify him with any such barge except the Crestwave Topper No. 1 which was not under the control of Mobil at the time of the accident. It had been released by Mobil more than two weeks prior thereto. We find as a matter of fact that Nation was not assigned to a drilling barge, that he was attached to Mobil's stationary platform, that as a matter of law his seaman's status is determined by the situs of his work at the time of his injury and that he was not therefore a seaman on the date of his death. *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 96 L.Ed. 205, 72 S.Ct. 216 (1952). *See also, Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 86 L.Ed. 184, 62 S. Ct. 221 (1941); *Flowers v. Travelers Ins. Co.*, 258 F.2d 220 (5th Cir. 1958).

The waters over the continental shelf are "high seas". 43 U.S.C. 1332. We find that the Nation's status under the

Longshoremen's Act is not altered by the fact that his death occurred while he was being transported aboard Mobil's helicopter on the high seas some distance from the stationary rig. Section 1333(a) of the Outer Continental Shelf Lands Act, in declaring that the laws of the adjacent states shall apply as federal law, refers specifically to "that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon". However, Section 1333(b) uses much broader language in referring to the jurisdiction of the United States District Courts:

> "The United States District Courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the Outer Continental Shelf for the purpose of exploring for, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the Outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent state nearest the place where the cause of action arose."

The geographic area of the district court's jurisdiction is much broader under Section 1333(b) than the specific subsoil, seabed and artificial structures referred to in Section 1333(a). Congress obviously intended in Section 1333(c), in making the provisions of the Longshoremen's and Harbor Workers Compensation Act applicable to employees' death or disability "occurring as a *result of operations in Subsec-*

tion (b) of this Section", that an employee's status and his coverage under the Act would not be subject to continuous and instant traffic-light (seaman to worker-worker to seaman) alterations as his duties might take him on and off the particular platform to which he was attached. *Bertrand v. Forest Corp.*, 441 F.2d 809 (5th Cir. 1971); *Nalco Chemical Corp. v. Shea*, 419 F.2d 572 (5th Cir. 1969); *Regan Equipment Co. v. Donovan*, 296 F.Supp. 535 (E.D. La. 1968). The Act envisions that the offshore platform employees have the assured protection of the compensation act. If Congress intended that status of such workers should not be job-related but simply site-related so that his status changed every time he stepped off the platform, the language of the Outer Continental Shelf Lands Act would have reflected this intent. As stated previously, the Act does not provide that the Longshoremen's Act shall apply to disability or death resulting from any injury on a platform. It provides that the Longshoremen's Act shall apply to disability or death "resulting from any injury occurring as result of operations described in subsection (b) of this section" which is quoted in full above. We find, therefore, that Nation's exclusive remedy is the Longshoremen's Compensation Act.

We hold therefore that all demands against defendant and third party defendant Bell be dismissed, that the claims of the representatives of Nation against Mobil be dismissed without prejudice to their rights under the Longshoremen and Harbor Workers Compensation Act, and that there be judgment in favor of the representatives of Higginbotham and against Mobil under the Death on the High Seas Act and the General Maritime Law and in favor of the representatives of Shinn against Mobil under the Jones Act, the Death on the High Seas Act and the General Maritime Law.

We recognize that the jurisprudence regarding quantum particularly under the General Maritime Law has undergone stages of development and change which require the submission of additional authorities. The rendition of formal judgment will be deferred until such authorities have been submitted and considered.

THUS DONE AND SIGNED, in Chambers, at Alexandria, Louisiana, on this 25th day of April, 1973.

s/ Nauman S. Scott
UNITED STATES
DISTRICT JUDGE

APPENDIX B

QUANTUM

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
OPELOUSAS DIVISION

Civil Action No. 13,954

MRS. FRANCIS NELL HIGGINBOTHAM ADMX. ETC.
OF MARSHALL K. HIGGINBOTHAM, DECEASED, ETC.

versus

MOBIL OIL CORPORATION, ET AL.

* * * * *

CIVIL ACTION NO. 13,958

MRS. WANDA MOORE LONG, ADMX. OF EST. OF
DECEASED JOSEPH C. LONG, JR., ETC.

versus

BELL HELICOPTER CO., ETC. ET AL.

* * * * *

CIVIL ACTION NO. 15,316

JEANETTE LEBLANC NATION, PERSONAL REPRE-
SENTATIVE FOR ELLA MENARD NATION AND ROY
GLEN NATION

versus

TEXTRON INDUSTRIES, INC., ETC. ET AL.

* * * * *

CIVIL ACTION NO. 15,326

MRS. ARLINE J. SHINN, IND., ETC.

versus

MOBIL OIL CORPORATION

* * * * *

(Consolidated Cases)

FOR PLAINTIFFS:	MESSRS.
Mrs. Nell Higginbotham Mrs. Jeanette LeBlanc Nations	Charles M. Thompson, Jr. 112 S. Louisiana Avenue Abbeville, Louisiana 70510
Mrs. Wanda Moore Long	Jack C. Caldwell Aycock, Horne, Caldwell & Coleman 519 Main Street Franklin, Louisiana 70538

Mrs. Arline J. Shinn	Jack C. Benjamin Kierr & Gainsburgh Suite 1718 National Bank of Commerce Building New Orleans, Louisiana 70112

FOR THIRD PARTY PLAINTIFF:

Mobil Oil Corporation	Carl J. Schumacher and Robert Badger Lemle, Kelleher, Kohlmeyer, Mathews & Schumacher 1800 National Bank of Commerce Bldg. New Orleans, Louisiana 70112

FOR DEFENDANTS:

Mobil Oil Corporation	Carl J. Schumacher and Robert Badger Lemle, Kelleher, Kohlmeyer, Mathews & Schumacher 1800 National Bank of Commerce Bldg. New Orleans, Louisiana 70112
	Ronald Neill Post Office Box 900 Dallas, Texas 75221

Bell Helicopter Company Bell Aerospace Corporation	Richard R. Christovich and C. Edgar Clouthier Christovich & Kearney Room 1815, American Bank Building New Orleans, Luisiana 70112
	James F. Fitzsimons Mendez & Mont New York, New York

NAUMAN S. SCOTT, JUDGE

QUANTUM

FINDINGS OF FACT

MARSHALL K. HIGGINBOTHAM

1. As per Letters Testamentary issued by the Fifteenth Judicial District Court for the Parish of Vermilion in the proceedings entitled "Succession of Marshall K. Higginbotham" bearing docket Number 5751, dated April 17, 1968, and the Tutorship of Donna Joyce Higginbotham, plaintiff, Mrs. Francis Nell Higginbotham, is the duly qualified testamentary executrix of the Succession of Marshall K. Higginbotham, the personal representative of his estate, and the duly qualified tutrix of Donna Joyce Higginbotham.

2. At the time of the accident, Marshall K. Higginbotham had been married to Francis Nell Higginbotham since June 24, 1950, and had lived with her until his death.

3. Marshall K. Higginbotham was born February 15, 1925, and at the time of death was 42 years of age and had a reasonable life expectancy of 29.45 years. Mrs. Higginbotham was born September 12, 1930, and according to life tables in evidence, had a reasonable life expectancy in excess of that of her husband. One child had been adopted by Mr. and Mrs. Higginbotham on September 21, 1962, but had lived with Mr. and Mrs. Higginbotham since she was six weeks old. This child, Donna Joyce Higginbotham, was nine years of age at the time of her father's death on August 15, 1967.

4. At the time of the casualty, decedent, his wife and Donna resided together in Vermilion Parish, Louisiana.

5. Mrs. Higginbotham and Donna were dependent upon decedent for their support and subsistence.

6. Although the evidence does not indicate the length of time which elapsed while the ill-fated helicopter was crashing, we find that the resultant crash was for all practical purposes instantaneous, thus precluding any award for conscious pain, suffering and mental anguish.

7. At the time of his death, Higginbotham was a senior tool pusher employed by Baxter Drilling Company, for whom he had worked continuously since June 11, 1963. Mr. Higginbotham was employed at a salary of $1100.00 per month, plus numerous other items paid in the form of additional salary. Baxter, a corporation of much smaller size than Mobil or Bell, for example, furnished an automobile to decedent, with all expenses included for operation, use, repairs and insurance on the automobile and for his full use. Dr. Herbert Hamilton, an eminent expert in

the field of economics and statistics, assessed a value of $225.00 a month for this one item. A hospitalization policy for his use and family use was furnished by the company. Because Mr. Higginbotham was employed for a company not as large as the defendants in this case, he was allowed considerable leeway in the form of entertainment for him and his family on his company expense account. Additionally, Mr. Higginbotham received other things of value from the safety award program. The evidence shows that he was awarded as many as 2400 S & H Green stamps monthly, if his rig operated without a lost time accident, plus a $50.00 United States Savings Bond at the end of six months and the equivalent of a $100.00 wrist watch at the end of an accident free year. Also, certain pleasure trips such as deer hunts were furnished by his employer as a token of the company's appreciation of his services. Also, according to the undisputed evidence, Mr. Higginbotham, had he lived, would have continued to enjoy increases in his earnings. Mr. Higginbotham and his family had commenced a business of raising running quarter horses, and at the time of his death, had accmulated ten horses. Mr. Higginbotham was a robust man and in excellent health at the time of his death.

8. For many months prior to his death, decedent had been assigned to work on locations in the Gulf of Mexico and worked thereon seven days at a time, followed by seven days off. While he worked offshore, he was furnished food and lodging by Mobil Oil Corporation without cost to him.

9. Because Mr. Higginbotham was employed by a company much smaller than Mobil, he had no scheduled retirement date. It was made very clear during the trial that Mr. Higginbotham had stable and regular employment with Baxter Drilling Company. Because Baxter did not have a stated policy of salary increases, Dr. Hamilton used the salary of D. W. Case, the man who replaced Mr.

Higginbotham after his death in trying to project a sensible rate of increase in the future. Dr. Hamilton presented three methods of calculation for pecuniary loss. Method one represents no change in salary at all from date of death. This method is not appealing. Method two was presented by using the salary of D. W. Case up to and including the date of trial with no change thereafter. This method of calculation also is not appealing because it is not likely that Mr. Higginbotham, with his most productive years ahead of him, would not have received a salary increase. Nevertheless, based on a salary of $15,000.00 a year which Mr. Case commenced receiving within a matter of a few months after Higginbotham's death, if these figures were used from date of death to June of 1973, Higginbotham's wage loss amounts to $87,500.00, not discounted, and from 1973 to 1990, the date on which Higginbotham would have reached age 65, this wage loss amounts to $202,329.00 plus the $87,500.00 or a total of $289,829.00. This would allow Higginbotham no wage increases from 1969 through 1990. Such an assumption is unreasonable.

The third method used by Dr. Hamilton embraced the salary of D. W. Case to the time of trial with approximately a five per cent (5%) annual increase thereafter. Dr. Hamilton reduced these figures to present values as of August 15, 1967, but since the money is not yet paid no reduction is to be made before judgment. The accrued loss of income from date of death to June 15, 1973, 70 months, approximates $93,940.00. This figure was arrived at by taking an expected average earning increase of $92.00 per month (D.W. Case received this) making a total monthly salary of approximately $1,342.00 with no discount up to June of 1973. This monthly salary of $1,342.00 was then projected to 1990 and discounted at five per cent (5%) making a total of $217,220.00. The $93,940.00 added to

$217,220.00 makes a total of $311,160.00. This amount has been reduced by a deduction of fifteen per cent (15%) for personal use, which reduces the net loss to the family to $264,486.00.

Mr. Higginbotham was furnished a car for his personal use while on the beach, an expense account for his personal use, and room and board while on the job. Also his personal consumption was small. The full use of an automobile until retirement, calculated from death to June of 1973 amounts to $15,750.00, not discounted. From June of 1973, to age 65 the loss is, discounted at five per cent (5%), $36,419.00 which makes a total loss of $52,169.00. Insurance, medical and hospital figures came to $3,049.00. not discounted because as Dr. Hamilton explained these costs are constantly on the rise.

10. Since decedent worked offshore two weeks out of every month, during which time he was furnished food and lodging without cost, since his personal needs were simple, and since his income was supplemented by the expense account and car, decedent required approximately fifteen per cent (15%) of his income for personal needs. This percentage is a fair and reasonable apportionment of Higginbotham's total income attributable to his personal use had he survived.

11. Higginbotham provided the guidance, care and discipline of a good father to the minor child Donna, who was residing in his household. His moral qualities, sense of values, beliefs and experiences in life, when considered with the close relationship which existed between him and his child, leads this Court to conclude that the minor child has sustained, during her minority, and will continue to sustain,

further loss from the lack of her father's care, guidance and discipline. This item of damages is assessed at $2,000.00 a year for the child throughout her minority and school years. The award to Donna Higginbotham for this item is $26,000.00.

12. The evidence was uncontradicted and unchallenged that decedent performed services in and about the house, assisting with the payment of bills, maintenance, transporting the family in his company car and on vacation trips. The Court is aware that services such as these have a value which the Court estimates at approximately $50.00 per month. The accrued loss and future loss amounts to approximately $11,956.00. This figure is comprised of an accrued loss of $50.00 per month for seventy (70) months or until June, 1973, or a total of $3500.00, not discounted. Then from June, 1973, decedent had approximately 25 years of reasonable life expectancy and this figure discounted at five per cent (5%) amounts to $8,456.00, or a total of $11,956.00.

13. The above enumerated elements constitute the damages allowable to the administratrix individually and in her representative capacity in this action. If the applicable law authorized an award of general damages, the Court, in this case, would find that the decedent and his wife were happily married for many years; that close and affectionate ties between him and his child did exist; and that each member of his family has sustained a loss from being deprived of his love, affection, companionship and society, and suffered emotional grief, as a result of his demise, in the following amounts:

Mrs. Marshall K. Higginbotham	$50,000.00
Donna Joyce Higginbotham	50,000.00
Total General Damages	$100,000.00

14. The pecuniary loss to Mrs. Marshall K. Higginbotham, surviving widow, and Donna Joyce Higginbotham, surviving dependent child, is as follows:

Loss of wages, to date	$93,940.00	
Future loss of earnings, discounted	$217,220.00	
Total Wage Loss		$311,160.00
Less fifteen per cent (15%) attributable to decedent's personal use	$ 46,674.00	
Net Loss to Family		$264,486.00
Loss of Employer's Contributions to Insurance, Medical & Hospital		$ 3,049.00
Loss of personal use of an automobile furnished as additional salary, to date	$15,750.00	
Loss of future use of automobile for personal use, discounted	$36,419.00	

Total loss of use of automobile for personal use		$ 52,169.00
Extra items in connection with employment including savings bonds and other valuables, to date	$ 1,400.00	
Future loss of extra items in connection with employment including savings bonds and other valuables, discounted	$ 3,237.00	
Total extra items		$ 4,637.00
Loss of services to the family, to date	$ 3,500.00	
Loss of services in the future for life expectancy discounted	$ 8,456.00	
Total loss of services		$ 11,956.00
Loss of nurture to Donna Joyce Higginbotham		$ 26,000.00
TOTAL PECUNIARY LOSS		$ 362,297.00

In addition to the lump sum award for nurture, that portion of the pecuniary loss to the minor should be distributed to her at the rate of $4,000.00 per year during minority or a total of $36,000.00. The remainder of the award for pecuniary loss is recoverable by the widow and totals $300,397.00.

JAMES L. SHINN

1. As per Letters Testamentary, issued by the Sixteenth Judicial District Court for the Parish of St. Mary, in the proceedings entitled "Succession of James L. Shinn," bearing docket No. 8213, dated August 12, 1968, plaintiff, Mrs. Arline J. Shinn, is the duly qualified testamentary executrix of the succession of James L. Shinn, and personal representative of his estate.

2. At the time of his death, James L. Shinn had been married to the said Arline Jones Shinn since March 5, 1931, and they had lived together continuously and without separation until his death.

3. The said James L. Shinn was born September 23, 1908, and at the time of his death was fifty-eight years old and had a reasonable life expectancy of 16.8 years. Mrs. Shinn was born on July 13, 1912, and, according to the life tables in evidence, had a reasonable life expectancy in excess of that of her husband. Six children were born of their marriage; namely: Patsy, on October 27, 1933; Phillip, on November 9, 1937; Eldon, on December 7, 1941; James, on January 25, 1944; Gene, on July 15, 1951; and Linda, on October 20, 1955.

4. At the time of the casualty, decedent, his wife, their fifteen-year-old son, Gene, and eleven-year-old daughter, Linda, resided together in Morgan City, Louisiana, in a mobile home at a camp furnished by decedent's employer, Mobil Oil Corporation.

5. Mrs. Shinn and the minor children, Gene and Linda, were dependent upon decedent for their support and sub-

sistence. None of the major children lived in decedent's household at the time of the casualty, nor did they depend upon him for their support.

6. Although the evidence does not indicate the length of time which elapsed while the ill-fated helicopter was crashing, we find that the resultant crash was for all practical purposes instantaneous, thus precluding any award for conscious pain, suffering and mental anguish.

7. At the time of his death, decedent, Shinn, was a senior drilling foreman, or toolpusher, employed by defendant Mobil, for whom he had worked continuously since 1936. Mr. Shinn was employed at a salary of $1,135 per month, plus a ten per cent (10%) bonus for working offshore, or a total wage of $1,249.00 per month. He received, also, certain fringe benefits from his employer and was a participant in all of the benefit plans provided by Mobil, including the savings plan, retirement annuity plan, group life insurance plan and medical insurance program.

8. For many months prior to his death, he had been assigned to work aboard the submersible drill barge, Penrod Drill Barge No. 50, on location in the Gulf of Mexico. His employment duties required him to work on the barge for seven days at a time, followed by seven days of office work at Mobil's headquarters in Morgan City. Then he returned for another seven days on the drill barge, followed by seven days of "off time." While he worked offshore aboard the drilling barge, his employer furnished him with food and lodging.

9. Mr. Shinn had been employed by Mobil for more than thirty years, and was scheduled to retire on October 1,1973.

His employment up to the time of his demise was stable and regular. According to information furnished by Mobil, Mr. Shinn was scheduled to receive a salary increment at an annual rate of approximately 5-6 per cent through 1970 and approximately 5-1/2 to 6-1/2 per cent through 1972. The accrued loss of income from the date of death to June 15, 1973, seventy (70) months, approximates $106,000.00. Since this amount has accrued, no present-value discount is required. In addition, we find decedent would have earned future wages until his retirmenent October 1, 1973, which, when discounted at a rate of five per cent (5%), which this Court finds reasonable, amounts to approximately $3,865.00.

10. Since decedent worked offshore two weeks out of every month, during which time he was furnished food and lodging without cost to him, and since his personal needs were rather simple (he had no expensive hobbies, did not drink or smoke, did not wear expensive clothes), the Court finds that the decedent required about fifteen per cent (15%) of his income for his personal needs. This percentage is a fair and reasonable apportionment of Shinn's total income attributable to his personal use had he survived.

11. The Court further finds that the contributions of Mobil for hospital and medical insurance to which the Shinn family was entitled, up to the date of Mr. Shinn's retirement amounts to $459.00. This loss has accrued also.

12. The value of Mobil's contributions to the savings plan in which Shinn was a participant, amounting to five per cent (5%) of his annual wages, computed to the date of his retirement, totals approximately $5,493.00 to which the claimants are entitled.

13. Had Mr. Shinn survived and retired as anticipated, he would have received a retirement pension from the date of his retirement until death (his life expectancy at retirement was 10.7 years) at an annual rate of $6,970.00. The gross value of this pension amounts to approximately $90,430.00 and, when discounted at the rate of five per cent (5%), the present value of these benefits is $52,105.00. It is not unreasonable to assume that during his retirement Mr. Shinn would utilize more of his income personally than he was using during his working life. His minor son would have reached majority, and, presumably, would not have depended upon support from his father; and the minor daughter would be approaching majority and presumptive independence. From the evidence given by Doctor Hamilton, the Court finds that the net loss to the family amounts to approximately one-half of the value of the retirement benefits, or approximately $26,053.00.

14. Shinn provided the guidance, care and discipline of a good father to the minors, Gene and Linda, who, were residing in the household. His moral qualities, sense of values, religious beliefs and experience in life, when considered with the close relationship which existed between him and his children, leads the Court to conclude that the minor children have sustained, and during their minority will continue to sustain, further loss from the lack of their father's care, guidance and discipline. This item of damages is assessed at the rate of $2,000.00 per year, per child, throughout the child's minority. The award to Gene for this item of damage is $10,000.00; to Linda, the sum of $20,000.00.

15. Based on the evidence which was uncontradicted and unchallenged, the Court finds that decedent was mechanically skilled and performed services in and about the house,

repairing things, maintaining the family automobile, cutting the grass, assisting with the payment of bills, transporting the family in the family car and escorting the family on vacation trips. The Court is aware that services such as these have a value, which the Court estimates at approximately $50.00 per month. The accrued loss and future loss, appropriately discounted, amounts to $8,000.00.

16. The above enumerated elements constitute the damages allowable to the administratrix, individually and in her representative capacity in this action. If the applicable law authorizes an award of general damages, that is to say, damages for nonpecuniary loss, the Court, in such case, would find that the decedent and his wife were happily married for many years, that close and affectionate ties existed between him and all of his children, that each member of his family has sustained a loss from being deprived of his love, affection, companionship and society, and suffered emotional grief as a result of his demise. Therefore, the Court would allow damages for this loss in the following amounts:

Mrs. Arline J. Shinn	$25,000.00
Gene Shinn	25,000.00
Linda Shinn	25,000.00
Patsy Shinn	20,000.00
Phil Shinn	20,000.00
Eldon Shinn	20,000.00
James Shinn	20,000.00

making a total of $155,000.00 general damages.

17. The pecuniary loss to Mrs. Arline J. Shinn, surviving widow, and Gene and Linda Shinn, surviving dependent

children, is as follows:

Loss of wages, to date	$106,000.00	
Future loss of earnings, discounted	3,865.00	
Total wage loss	$109,865.00	
Less fifteen per cent (15%) attributable to decedent's personal use	- $ 16,470.00	
Net loss to family		$ 93,395.00
Loss of employer's contribution to savings plan		$ 5,493.00
Loss of employer's contribution to hospital and medical insurance plan		$ 459.00
Loss of retirement pension benefits, discounted	$ 52,105.00	
Less fifty per cent (50%) attributable to decedent's personal use	- $ 26,052.00	
Net retirement pension benefits due to family		$ 26,053.00
Loss of nurture: Gene Shinn		$ 10,000.00

Linda Shinn	$20 , 000 . 00
Loss of services, discounted	$ 8,000.00
TOTAL PECUNIARY LOSS	$163,400.00

18. In addition to the lump-sum aware for nurture, that portion of the other pecuniary losses to which the minors are entitled, namely, $15,000.00 to Gene Shinn and $30,000.00 to Linda Shinn,should be distributed to them at the rate of $3,000.00 per year, per child, during minority. The remainder of the award for pecuniary loss, namely, $88,400.00, is recoverable by the widow.

CONCLUSIONS OF LAW

Mrs. Francis Nell Higginbotham, as Testamentary Executrix of the Succession of Marshall K. Higginbotham, and as personal representative of his estate, has standing to sue for the claims arising from his death under the Death on the High Seas Act and under the General Maritime Law. 46 U. S.C.A. § 688; 46 U.S.C.A. §§761, 762; *Lindgren v. U.S.*, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 688 (1930); *Morange v. States Marine Line, Inc.*, 398 U.S. 75, 90 S.Ct. 772, 26 L.Ed. 2d 339 (1970). Likewise, Mrs. Arline J. Shinn, as Testamentary Executrix of the Succession of James L. Shinn, and as personal representative of his estate, has standing to sue for the claims arising from his death under the Jones Act, the Death on the High Seas Act, and the General Maritime Law. 46 U.S.C.A. § 688; 45 U.S.C.A. §§51, 59; 46 U.S.C. §§ 761, 762; *Lindgren v. U.S., supra; Morange v. States Marine Lines, Inc., supra; Futch v. Midland Enterprises, Inc.*, 344 F.Supp. 324 (M.D. La. 1972), *aff'd* Jan. 8, 1973, *unreported* (No. 72-2900, 5th Cir.)

The personal representative of each of the decedents may recover for the actual pecuniary loss occasioned by the death. This is the measure of damages under theJones Act, the Death on the High Seas Act, and the General Maritime Law. 46 U.S.C.A. § 688; 45 U.S.C.A. §51; 46 U.S.C.A. §§761, 762; *Michigan Central Railway Co. v. Vreeland*, 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417 (1913); *Neal v. Saga Shipping Co.*, 407 F.2d 481, (5th Cir. 1969); *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959), *cert. denied* 361 U.S. 88, 80 S.Ct. 157, 4 L.Ed. 2d 121.

Under all of the applicable laws, the Jones Act, the Death on the High Seas Act, and the General Maritime Law, the dependent survivors of each of the decedents are entitled to recover damages for the loss of contributions and support that they would have received out of the accrued and future gross earnings of the decedents had they lived. *Stock v. Chicago Northshore and Milwaukee Railroad Co.*, 203 F.2d 786; *Canal Barge Co., Inc. v. Mary Kathryn Griffith*, No. 71-2226, 5th Cir. 1973; *Morange v. States Marine Lines, Inc., supra; National Airlines, Inc. v. Stiles, supra.*

In determining the extent of loss from future earnings, the Court should consider the decedents' actual earnings at the time of death, his work habits, and his prospects for advancement. *Petition of Risdal & Anderson, Inc.*, 291 F. Supp. 353 (D.C. Mass. 1968); *Petition of Canal Barge Co.*, 323 F.Supp. 805 (N.D. Miss. 1971). The Court should make no deduction for State and Federal income taxes where the yearly estimated earnings, as here, are not clearly above the reach of the middle income scale. *Canal Barge Co., Inc. v. Mary Kathryn Griffith, supra; Blue v. Western Railway*, 469 F.2d 487, 492-96 (5th Cir. 1972); *petition for cert. filed*, 41 U.S. L.W. 3393 (Jan. 10 1973) (No. 72-972);

In Re Marina Mercante Nicaraguense, S.A., 364 F.2d 118 (2nd Cir. 1966), *cert. denied*, 385 U.S. 1005, 17 L.Ed. 2d 544 (1967); *McWenny v. New York, N.H. and H. R. R.*, 282 F.2d 34 (2nd Cir. 1960), *cert. denied*, 364 U.S. 870, 81 S. Ct. 115, 5 L.Ed. 2d 93; *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967), *cert. denied*, 389 U.S. 1044, 88 S.Ct. 788, 19 L.Ed. 2d 836.

Post award losses must be discounted or reduced to present value. We find that under the economic conditions governing this case, a discount rate of five per cent (5%) is proper. *Chesapeake & Ohio Railway v. Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117 (1916); *Blue v. Western Railway of Alabama, supra.*

Privation of parental nurture and guidance to a minor child is an element of pecuniary loss long recognized by federal decisions. *Michigan Central Railway Co. v. Vreeland, supra; Petition of Risdal, supra.* The value of parental nurture, as heretofore found, varies directly with his quality and quantity. *Moore-McCormick Lines, Inc. v. Richardson*, 295 F.2d 583 (2nd Cir. 1961).

Loss of the decedents' services is another pecuniary loss allowable under the laws applicable herein. *Michigan Central Railway Co. v. Vreeland, supra; Dennis v. Central Gulf S.C. Corp.*, 453 F.2d 137 (5th Cir. 1972). Such services of which the Higginbothams and the Shinns have been deprived in the instant case have a definite value although the value has not been established to the penny. To allow a tort-feasor to avoid paying damages, however, because such damages were to some necessary extent imperfectly established, would be unjust and unbearable. *Canal Barge Co., Inc. v. Mary Kathryn Griffith, supra; ABC Paramount*

Records, Inc. v. Tops Record Distributive Co., 374 F.2d 455 (5th Cir. 1967); *See also, Bigalow v. RKO Radio Pictures*, 327 U.S. 251, 264, 66 S.Ct. 754, 780, 90 L.Ed. 2d 652, 660 (1946).

Since the decision in *Morange, supra*, there have been district court decisions awarding damages for non-pecuniary losses, such as loss of society and survivors' grief. *In Re Sincere Navigation Corp.*, 329 F.Supp. 652 (E.D. La. 1971); *In Re Farrell Lines*, 339 F.Supp 91 (E.D. La. 1971); however, the circuit courts which have considered the issue have uniformly denied grief damages in a general maritime action. *Canal Barge Co., Inc. v. Mary Kathryn Griffith, supra; Green v. Vantage S.S. Corp.*, 466 F.2d 159 (4th Cir. 1972); *Simpson v. Knutsen, O.A.S.*, 444 F.2d 523 (9th Cir. 1971); *In re U.S. Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970). Consequently notwithstanding our factual finding that the survivors have suffered loss of love and affection, and grief as a result of the demise of Mr. Higginbotham and Mr. Shinn we disallow this item of damage. *Canal Barge Co., Inc. v. Mary Kathryn Griffith, supra.*

Pre-judgment interest is discretionary with the court in death claims under the Jones Act, the Death on the High Seas Act, and the General Maritime Law. *Doucet v. Willis Drilling Co.*, 467 F.2d 336 (5th Cir. 1972); *National Airlines Inc. v. Stiles, supra; In re U.S. Steel Corp., supra.* In order to compensate the parties fairly and justly for their losses, the Court will allow pre-judgment interest on these claims at the rate applicable in this form, from date of death, August 15, 1967.

Although we are aware of *Soileau v. Nicklos Drilling Co.*, 302 F.Supp 119 (W.D. La. 1969), which allowed an award for expected accumulation of community property, we feel

that such an award in this case would be far too speculative.

In determining the amount of the awards for loss of future earnings, we did not take into consideration the decreasing purchasing power of the dollar. Although there are some cases which hold that it is proper to include in this computation costs of living increases, *Cunningham v. Bay Drilling Co.*, 421 F.2d 1398 (5th Cir. 1970); *Canal Barge Co., Inc. v. M. K. Griffith, supra.* we feel that such an additional award would have to await the final outcome of the Fifth Circuit Court of Appeals en banc rehearing of *Johnson v. Penrod Drilling Co.* (Nos. 71-2243, 71-2245).

Plaintiffs should submit a judgment for execution in accordance with Rule 9(e) of this Court.

THUS DONE AND SIGNED in Chambers, at Alexandria, Louisiana, on this 25th day of June, 1973.

S/ Naumann S. Scott
UNITED STATES DISTRICT
JUDGE

APPENDIX C

OPINION OF CIRCUIT COURT OF APPEALS

Mrs. Francis Nell HIGGINBOTHAM, Admx., etc., of Marshall K. Higginbotham, Deceased, etc., et al., Plaintiffs - Appellees Cross-Appellants,

v.

MOBIL OIL CORPORATION, et al., Defendants-Appellants Cross-Appellees

Mrs. Wanda Moore LONG, Admx. of the Estate of Deceased Joseph C. Long, Jr., etc., PLaintiff-Appellant

v.

BELL HELICOPTER CO., etc., Defendant-Appellee

Jeanette LeBlanc NATION, Personal Representative for Ella Menard Nation and Roy Glen Nation, Plaintiffs-Appellants,

v.

TEXTRON INDUSTRIES, INC., etc., et al., Defendants-Appellees.

Mrs. Arline J. SHINN, Individually, etc., et al., Plaintiffs-Appellants,

v.

MOBIL OIL CORPORATION and Bell Helicopter, Defendants-Appellees.

No. 74-1275

United States Court of Appeals, Fifth Circuit

Jan. 13, 1977.

Consolidated actions were brought as a result of the death of a pilot and three passengers in a helicopter crash in the Gulf of Mexico. Defendants were the owner operator of the helicopter and the manufacturer. The manufacturer was exonerated, but the owner operator found liable, by the United States District Court for the Western District of Louisiana, Opelousas Division, Nauman S. Scott, J. 357 F. Supp. 1164. Damages were subsequently awarded, 360 F. Supp. 1140. On appeal by all parties except the manufacturer, the Court of Appeals, Thornberry, Circuit Judge, held that the owner operator had properly been held liable. Contrary to the finding of the district court, one passenger, employer by the owner operator, was a seaman on the date of his death, for which there was liability under the Jones Act. Testimony concerning future wage increases was insufficient to support an award based upon a five per cent future earnings increase factor. Death on the High Seas Act was not exclusive wrongful death remedy outside of state territorial waters, and, under maritime wrongful death remedy, representatives of decedents, on proper proof, could recover for loss of society. If representatives of the seaman could establish their right to recovery under maritime wrongful death remedy, their recovery under the Jones Act was not a bar to an award for loss of society.

Affirmed in part; reversed in part and remitted.

Godbold, Circuit Judge, filed an opinion concurring in part and dissenting in part.

Gee, Circuit Judge, filed an opinion concurring in part and dissenting in part.

1. Products Liability -- 75

Causation must be established under doctrine of strict liability, as well as under ordinary negligence.

2. Evidence -- 570

Expert testimony is not controlling but, rather, its credibility is for trier of fact.

3. Courts -- 406.3(22)

Trial judge's reliance on metallurgical evidence for substantiation or refutation of plaintiffs' theory of causation of helicopter crash was understandable whether he was subjectively concerned with negligence or with strict liability, and thus there was not shown any mistake of law to render inapplicable the general rule that trial court's findings would be accepted unless clearly erroneous.

4. Aviation -- 13

Evidence sustained finding that plaintiffs had not carried their burden of proof, against manufacturer of helicopter, as to whether cause of crash was metal fatigue.

5. Negligence -- 121.2(12)

Applicability of res ipsa to any species of accident depends in first instance upon whether mishap is of type that ordinarily does not occur in absence of negligence; rule is based upon human experience, and its application to particular situation must necessarily vary with human experience.

7. Negligence -- 121.2(12)

Application of res ipsa to one defendant and not to another requires that circumstances surrounding injury render it more probable that injury was due to that defendant's negligence than that of the other defendant.

8. Negligence -- 121.2(7)

Every possible alternative cause of injury need not be totally excluded for res ipsa to apply; all that is necessary is that likelihood of other causes be sufficiently reduced that fact finder may reasonably conclude from preponderance of evidence that fault, if any, is attributable to party against whom doctrine is employed.

9. Courts -- 406.3(22)

Where, although trial judge could not attribute helicopter crash to any specific cause, he concluded that, as to helicopter operator, total effect of evidence afforded reasonable inference of fault, no clear error was shown in his finding of negligence on part of operator or in trial judge's being aided by doctrine of res ipsa loquitur, though he found "insufficient" evidence rather than "no" evidence of negligence on part of manufacturer.

10. Seamen -- 29(2)

Once it is established that claimant is seaman, Jones Act permits recovery even if he sues for injuries received while off ship and engaged in temporary work for his employer unreleated to service of the ship. Jones Act, 46 U.S.C.A. §688; Longshoremen's and Harbor Workers' Compensation

Act, §§1 et seq., 5, 33 U.S.C.A.§§901 et seq., 905.

11. Seamen -- 29(5.16)

Generally, determination of whether individual is "seaman" within purview of Jones Act or maritime law is purely factual matter for determination by jury or fact finder. Jones Act, 46 U.S.C.A. § 688.

See publication Words and Phrases for other judicial constructions and definitions.

12. Seamen -- 29(2)

Situs of work is not determinative in Jones Act case; seaman, once he has become such, retains his status so long as he performs substantial part of his work on the vessel. Jones Act, 46 U.S.C.A. §688.

13. Courts -- 406.3(10)

Where trial judge's finding was tainted by misapprehension of controlling legal principles, review of evidence by Court of Appeals was free from constraints of clearly erroneous rule.

14. Seamen -- 2

Where during two years prior to his death decedent spent all but small fraction of his working time on submersible drilling barges and where, as drilling foreman, he plainly contributed to mission of drilling barges upon which he was normally stationed, and he was assigned to fixed platform where he had worked during week preceding his death only

as presumably temporary replacement for vacationing foreman, he was, though assigned to work on fixed platform from which he departed as passenger in helicopter which crashed, a "seaman" employee, and his representatives were entitled to maintain Jones Act action for his death. Jones Act, 46 U.S.C.A. § 688; Longshoremen's and Harbor Workers' Compensation Act, §§ 1 et seq., 5, 33 U.S.C.A. § §901 et seq., 905; Outer Continental Shelf Lands Act, §4(b, c), 43 U.S.C.A.§ 1333(b,c).

15. Death -- 58(2)

In absence of any evidence to support award for conscious pain and suffering prior to death, recovery for pain and suffering was properly denied in actions under Death on the High Seas Act, Jones Act, and General maritime law. Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, §1 et seq., 46 U.S.C.A. §761 et seq.

16. Death -- 58(1)

To recover at all for future wage raises, plaintiff was required to bear difficult burden of proving what portion of increases would have been given other than as automatic hedge against inflation, and, although trial judge specifically stated he did not take into consideration decreasing purchasing power of dollar, award based upon five percent future earnings increase factor could not stand.

17. Death -- 67

It is within trial judge's discretion to reject any testimony concerning future wage increases as too speculative to support recovery.

18. Death -- 88

Death on High Seas Act was not exclusive wrongful death remedy outside of state territorial waters, and, under maritime wrongful death remedy, representatives of decedents, on proper proof, could recover for loss of society.Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

19. Death -- 91

If representatives of seaman could establish their right to recovery under maritime wrongful death remedy, their recovery under Jones Act was not bar to an award of damages for loss of society. Jones Act, 46 U.S.C.A. § 688.

* * * * *

Appeals from the United States District Court for the Western District of Louisiana.

Before THORNBERRY, GODBOLD and GEE, Circuit Judges.

THORNBERRY, Circuit Judge:

These four consolidated actions were brought to recover damages for the death of the pilot and three passengers of a Bell Jet Ranger helicopter that crashed in the Gulf of Mexico. Plaintiffs sought recovery from Mobil Oil Company, who owned and operated the helicopter, and Bell Helicopter Company, who manufactured it. Mobil cross-claimed against Bell for the cost of the aircraft and for indemnity as to any amounts it might be required to pay to the individual plaintiffs. The district court held Mobil liable for the death of Higginbotham, one of the passengers,

under the Death On the High Seas Act[1] (DOHSA) and general maritime law. It likewise held Mobil liable for the death of Shinn, another passenger, under DOHSA, the Jones Act,[2] and general maritime law. The court found that Nation, the third passenger was a nonseaman employee of Mobil; thus, his representative's recovery was limited to benefits payable under the Longshoremen's and Harbor Workers' Compensation Act[3] (LHWCA). Finally, the district court exonerated Bell entirely, cutting off any recovery by pilot Long's representatives, who sued only Bell.[4] All parties appeal, except Bell.

I

The chief contentions raised in this court concern the district judge's (1) exculpation of Bell, (2) his application of res ipsa loquitur in finding Mobil liable to Shinn's and Higginbotham's representatives, and (3) his ruling as to pas-

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1. 46 U.S.C. § 761 *et seq.* The district judge concluded that admiralty jurisdiction existed over this suit because the accident took place on the high seas and "in conjunction with its extensive offshore activities." 357 F.Supp. 1164, 1167. We think this conclusion correct under *Executive Jet Aviation v. Cleveland,* 1972, 409 U.S. 249, 93 S.Ct493, 34 L.Ed. 2d 454. Admiralty jurisdiction over aircraft accidents occurring on the high seas is not automatically ousted because the craft initially took off from or is normally based within the continental United States. See *In re Dearborn Marine Serv., Inc.* 5 Cir. 1974, 499 F.2d 263, 272 n.17; *Roberts v. United States,* 9 Cir. 1974, 498 F.2d 520, 523-24; *cf.* American Home Assur. Co. v. United States, M.D. Pa. 1975, 389 F.Supp. 657.

2. 46 U.S.C. § 688. The court found, and defendants do not contest, that Shinn's work on a drilling barge made him a Jones Act seaman.

3. 33 U.S.C§ 901 et seq.

4, The district judge's decision as to Bell naturally also required dismissal of Mobil's cross-claims.

senger Nation. The parties also raise a number of subsidiary issues that require discussion. Nevertheless, the facts of the case are fairly straightforward. Mobil used the Bell-manufactured helicopter as an airborne crewboat, ferrying workmen to and from offshore drilling sites. On August 15, 1967, sometime between 3:30 and 4:00 o'clock in the afternoon, the aircraft took off from Baxter Rig No. 3 with all four decedents aboard. When it failed to arrive at its scheduled destination a search was instituted, and the searchers soon discovered wreckage from the helicopter floating several miles from the craft's point of departure. Only a few pieces of the Jet Ranger were recovered, no one witnessed its crash, and no bodies were ever recovered. There had been no radio communication with the helicopter before its disappearance.

II.

The individual plaintiffs (and Mobil) contend that the district judge erred in holding that no case was made out against Bell. At trial they relied upon three different types of evidence to establish Bell's liability. First, they introduced the testimony of two "aircraft crash reconstruction" experts. These witnesses testified, in substance, that all physical evidence available – including the allegedly inverted position of the helicopter when it hit the water, the pattern of damage to the recovered portions of the craft, and the position of the tailboom almost one-half mile from the remainder of the wreckage -- indicated, or was consistent with the theory, that the tailboom separated from the helicopter in mid-air causing it to plummet out of control into the water. Second, to give some substance to their mid-air separation theory, plaintiffs (and Mobil) introduced the testimony of metallurgists who stated that in their opinion

the portion of the tailboom that was recovered contained a fatigue crack. From this crack, these witnesses theorized, a tension crack propagated over nearly the complete circumference of the boom, resulting in compression at the top of the boom and eventually a complete tearing off of the tail from the rest of the helicopter. Finally, plaintiffs (and Mobil) adduced evidence showing that the helicopter involved in the crash was of a new design and that repeated complaints concerning cracks appearing in the tails of these new aircraft compelled Bell to change the alloy used in the tailboom from magnesium to aluminum.

In brief summary, Bell's witnesses disputed the existence of any fatigue cracks in the tailboom, argued that the Jet Ranger represented the highest state of the art, and asserted that the cracks reported by other users of this model helicopter were viewed by Bell and most owners of the craft as a maintenance nuisance rather than a safety hazard. Bell's experts also offered explanations other than mid-flight separation of the tailboom for the pattern of damage to the recovered portions of the Jet Ranger.

The district judge weighed this testimony and entered the following findings of fact:

> The evidence does not establish that a fatigue fracture occurred in the tailboom . . . [and] is not sufficient to establish that an inflight separation of the tailboom caused the crash . . . . In fact, evidence is so insufficient that no actual, probable or suggestive cause of the crash . . . [can] be determined with any degree of certainty.

357 F.Supp. at 1171-72. In light of these adverse fact-findings and the spectre of the "clearly erroneous" rule,

plaintiffs (and Mobil) not unexpectedly invoke the doctrine that "findings induced by or resulting from a misapprehension of controlling substantive principles lose the insulation of F.R.Civ. P. 52(a) and a judgment based thereon cannot stand." *Continental Motors Corp. v. Continental Aviation Corp.*, 5 Cir. 1967, 375 F.2d 857, 859. Specifically, they argue that the trial judge erroneously believed that Bell could be held liable only for some particular negligent act, while in fact, plaintiffs say, they alleged and proved a good cause of action under the doctrine of implied warranty or strict products liability.

Their reasoning goes something like this. The district judge stated that "the case of plaintiffs and Mobil against Bell hinges entirely on the validity of its metallurgists experts . . . [T]he testimony of their other witnesses is principally corroborative . . . ." 357 F.Supp. at 1168. This statement, together with the judge's emphasis on whether the evidence supported the existence of a fatigue failure, reveals the lower court's belief that plaintiffs needed to prove a specific defect in the helicopter. Under products liability doctrines, however, no specific defect need be shown as long as plaintiff establishes that the product malfunctioned. Accordingly, the testimony of the accident reconstruction experts constituted the main thrust of the case-- since that testimony suggested that the helicopter crashed after a mid-flight separation of the tailboom -- and the testimony of the metallurgists was merely corroborative and precautionary since no matter why the boom fell off, a helicopter whose tailboom did so under ordinary flight conditions must have been defective. Hence, the trial judge's misapprehension of the applicable law led him to emphasize the wrong evidence, and this mistaken emphasis accounts for his erroneous conclusion that the tailboom did not break off in mid-air.

Notwithstanding our respect for the ingenuity of plaintiff's theory, we cannot accept it.[5] Initially, we are not convinced that the district judge misunderstood the nature of plaintiffs' case. The complaint clearly alleged negligence, as well as other theories, and much of plaintiffs' evidence manifestly was intended to establish that Bell's testing and supervisory procedures were negligently conceived and executed. Hence, references to negligence in the lower court's opinion are hardly conclusive.

[1-3] Second, plaintiffs fail to understand that the judge's finding that no mid-flight separation took place goes primarily to causation and only circumstantially to the

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5. It is worth mentioning that our court recently reserved the question whether products liability doctrine should be made a part of the general maritime law. *Williams v. Brasea*, 5 Cir. 1974, 497 F.2d 67, 78. This case, however, like *Williams*, is in our view an inappropriate vehicle for deciding the issue, because we conclude that the facts here are insufficient in any event to establish liability under the theory.

We recognize, of course, that a number of courts, including several district courts within this Circuit, have permitted admiralty suits based upon either the breach of an implied warranty or strict products liability. *See Lindsay v. McDonnell Douglas Aircraft Co.*, 8 Cir. 1972, 460 F.2d 631; *Streach v. Assoc. Container Transp. Ltd.*, C.D. Cal. 1975, 388 F.Supp. 935; *Houston-New Orleans, Inc. v. Page Engineering Co.*, E.D.La. 1972, 353 F.Supp. 890, 899; *Sears, Roebuck and Co. v. American President Lines, Ltd.*, N.D. Cal. 1971, 345 F.Supp. 395, 401-02; *Kropp v. Douglas Aircraft Co.*, E.D.N.Y. 1971, 329 F.Supp. 447, 455; *Ohio Barge Line, Inc. v. Dravo Corp.*, W.D. Wash. 1971, 326 F.Supp. 863; *In re Alamao Chemical Transp. Co.*, S.D. Tex. 1970, 320 F.Supp. 631, 634-38; *In re Marine Sulphur Transp. Co.*, S.D.N.Y. 1970, 312 F.Supp. 1081, 1102, *modified*, 2 Cir., 460 F.2d 89, *cert denied*, 1972, 409 U.S. 982, 93 S.Ct. 318, 34 L.Ed. 2d 246; *Solleau v. Nicklos Drilling Co.*, W.D. La. 1969, 302 F.Supp. 119, 126-27.

existence of a manufacturing defect.[6] As the Second Circuit recently noted:

> The burden of proving causation is on the plaintiff. . . and causation must be established under the doctrine of strict liability, as well as under ordinary negligence.

In re Marine Suplhur Queen, 2 Cir. 1972, 460 F.2d 89, 101-02; see also *Leverson v. Boeing Co.*, 9 Cir. 1975, 510 F.2d 937. Thus, whether the district judge believed that these cases were based upon negligence or upon strict liability, his inquiry concerning causation would be essentially the same.

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6. This misunderstanding explains plaintiffs' erroneous reliance on *Lindsay v. McDonnell Douglas Aircraft Co.*, 8 Cir. 1972, 460 F.2d 631. In *Lindsay* the Eighth Circuit, after concluding that federal maritime law would and should adopt the doctrine of strict liability in tort, *id.* at 635-36, remanded the case to the district court for a determination of whether a fire observed on a crashing jet airplane was the cause of the accident. The court stated that plaintiff need not prove a specific defect, for the existence of a fire on board "would strongly indicate a malfunction in the aircraft itself resulting from some defect in either manufacture, material, or design." *Id.* at 637. Nevertheless, the court also warned that because the evidence was circumstantial, the inference of defective manufacture from a known malfunction was merely permissible, not compelled. *Id.* at 640. On remand, the district court found that the airplane was not on fire when it hit the water and concluded that plaintiff had not established the existence of a defect. *Lindsay v. McDonnell Douglas Aircraft Corp.*, E.D. Mo. 1972, 352 F.Supp. 633. Plaintiff again appealed, but this time the Eighth Circuit affirmed, holding that the lower court's findings were not clearly erroneous, *Lindsay v. McDonnell Douglas Aircraft Corp.*, 8 Cir. 1973, 485 F.2d 1288.

Lindsay was a stronger case than this one from the plaintiff's viewpoint. Mrs. Lindsay offered the testimony of a shrimp boat captain that he saw Mr. Lindsay's plane burning just before it crashed. Here plaintiffs had no direct evidence of mid-air separation of the tailboom–analogous to the fire in *Lindsay*–so the trial judge to find Bell liable would have been required to infer not just the defect from the malfunction, but the malfunction itself.

Here plaintiffs' only explanation of the crash, as against Bell, was that the tailboom of the helicopter broke off in mid-flight. They needed to prove that theory before they could argue their strong circumstantial case that only a manufacturing defect could have caused such a failure. *Cf. Lindsay v. McDonnell Douglas Aircraft Co.*, supra, at 639-40; *Krause v. Sud-Aviation*, 2 Cir. 1969, 413 F.2d 428. The trial judge's statements about the relative importance of the two types of expert testimony offered by the plaintiffs almost certainly reflected his conclusion that the accident reconstruction evidence was utterly insufficient to establish that the tailboom came off in mid-air without some credible explanation of *why* such an unusual occurrence might have taken place. That is, he focused on the alleged specific defect not necessarily because he thought plaintiffs needed to prove such a defect by direct evidence in order to establish that Bell breached some duty toward persons in plaintiffs' position, but because without the alleged defect he could give no credence to plaintiffs' causation theory. The credibility of expert testimony is for the trier of fact; as this court only recently noted, "expert witnesses appear to assist in the court's decision-making process, not to control it." *Reyes v. Wyeth Laboratories*, 5 Cir. 1974, 498 F.2d 1264, 1289. Bell's witnesses sharply contradicted plaintiffs' accident reconstruction experts on the possibility of mid-air tailboom separation. Hence, we think that the trial judge's reliance on the metallurgical evidence for substantiation or refutation of plaintiffs' theory of causation is perfectly understandable regardless of which theory of Bell's duty--negligence or strict liability--he was subjectively concerned with. For the reasons stated, then, we reject plaintiffs' attempt to strip the lower court's factfinding concerning causation of its "clearly erroneous" shield.

[4] Plaintiffs do not rely solely on their mistake of law attack on the findings of fact, however. They also allege numerous errors in the district court's factual deductions, any one of which if established, they contend, would render the findings clearly erroneous. The voluminous record in this case plainly prevents us from summarizing and analyzing all of these evidentiary challenges. Nevertheless, we have carefully examined each one in light of the record and the district court's opinion. We note that plaintiffs steadfastly insist that their evidence was "uncontradicted." To the contrary, our examination of the record reveals that Bell's witnesses repeatedly contradicted plaintiffs' witnesses, both on the likelihood of mid-air separation of the tailboom[7] and on the existence of a fatigue crack at the area

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7. As earlier noted, plaintiffs cite several items of "accident reconstruction" evidence to support their mid-air separation theory. These include: (1) the routine nature of the flight; (2) the pattern of damage to the recovered portions of the helicopter; (3) the position of the tailboom approximately one-half mile west of the other portions of the wreckage; (4) the allegedly inverted position of the aircraft when it hit the water; and (5) the absence of main rotor strikes on the tailboom.

Without purporting to summarize all of the contrary evidence, and without identifying particular pages in the appendix, the following rebuttal evidence either appears directly in the testimony or is inferable from it: (1) when the helicopter left the drilling rig low level flying conditions in the area were "very poor" due to intermittent showers and thundershowers in the general area; (2) the pattern of damage to the recovered portions of the craft were consistent with a full power crash into the choppy water with resultant tumbling of the helicopter in unpredictable ways; (3) the tailboom may have been either thrown west of the wreckage by the initial impact or blown west by the current and the wind, both of which were westerly; (4) the allegedly inverted attitude of the helicopter when it hit the water may have been attributable either to accidental pilot action or a malfunction in the controls; and (5) the absence of main rotor strikes on the tailboom refutes rather than supports plaintiffs' theory, because if the boom had torn off as plaintiffs argue it would have unavoidably entered the path of the rotor blades.

between six o'clock and eight o'clock on the circumference of the tail.[8] The district judge, who heard the testimony and viewed the exhibits, concluded that plaintiffs had not carried their burden of proof against Bell as to the cause of this unfortunate accident. We cannot say that his conclusion was clearly erroneous.[9] *See Leverson v. Boeing Co.*,

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8. Regarding the existence of a fatigue crack on the tailboom, plaintiffs relied heavily on the testimony of their metallurgists that certain grain deformation typical of tensile-shear failure did not appear in the area on the boom where they argued that the cracking began in fatigue. All of Bell's witnesses denied seeing any evidence of fatigue, and, as the district judge noted, other physical evidence contradicts the fatigue theory. As for the statement in the opinion that "practically the entire fracture occurred in compression," we do not view it, as plaintiffs do, as damning evidence of the district judge's misunderstanding of the metallurgical evidence. Taken in context it is reasonably clear that Judge Scott meant only to say that the extensive areas of compression on the tailboom clockwise between the nine o'clock and 4:30 positions (to which plaintiffs' witnesses testified, *see* App. at 639-640) were more consistent with Bell's "instantaneous static overload" view than with plaintiffs' "fatigue crack and tear" theory. Moreover, at one point in his testimony one of plaintiffs' own witnesses stated that the section of the boom discussed by Judge Scott "started failing in compression," before correcting himself by stating that as a "technical point" no metal fails in compression.

Judge Scott noted his "lack of expertise" in metallurgy. We likewise note ours. Perhaps our judicial system can and should develop better methods for trying difficult questions of scientific or technological fact. *See, e.g.*, Danaher, Piehler, Twerski, & Weinstein, *Product Liability; An Interaction of Law and Technology*, 12 Duquesne L. Rev. 425 (1974); *The Technological Expert in Products Liability Litigation*, 52 Texas L.Rev. 1303 (1974). Nevertheless, this case requires decision now and under our present system; we decline to overturn the considered findings of the district judge on the fatigue issue based only upon the simultaneous presence of disputed expert metallurgical testimony and ambiguous cracks. *See* Danaher, Piehler, Twerski, & Weinstein, *supra*, 12 Duquesne L.Rev. at 430 n. 11; 52 Texas L.Rev. at 1311.

9. The clearly erroneous standard is of course fully applicable to suits in admiralty. *Coulter v. Ingram Pipeline, Inc.*, 5 Cir. 1975, 511 F.2d 735, 736, n. 1.

supra; Lindsay v. McDonnell Douglas Aircraft Co., 8 Cir. 1973, 485 F.2d 1288; *Krause v. Sud-Aviation, supra; Montgomery v. Goodyear Aircraft Corp.*, 2Cir., 1968, 392 F.2d 777.

III.

Having eliminated Bell from the liability picture, the district court proceeded to inquire whether the individual plaintiffs had proved a case against Mobil. After considering the evidence in some detail the court concluded that the accident could not be attributed to any specific derelictions by that company. Nevertheless, aided by the doctrine of res ipsa loquitur Judge Scott ruled that the "total effect of the evidence" afforded a reasonably sufficient basis for attributing the crash to some negligence on the part of Mobil or its employees. Mobil's challenge to this finding requires us to answer two questions: (1) can the res ipsa loquitur doctrine be applied at all to aircraft crashes, and (2) if it can, is its application nonetheless barred here because plaintiffs introduced, along with their evidence against Mobil, evidence of Bell's responsibility for the crash?

Over thirty years ago this court addressed similar questions. In *Morrison v. LeTourneau Co.*, 5 Cir. 1943, 138 F. 2d 339, plaintiff sued both the owner and the operator of an airplane that crashed in unexplained circumstances, killing plaintiff's intestate. After reviewing the meager evidence concerning the cause of the accident, the court ruled that not even res ipsa loquitur could rescue plaintiff's case:

> The doctrine of res ipsa loquitur cannot apply in cases of this sort, because there is no showing that accidents of this very nature cannot happen to the most skillful pilots in planes of the finest type and condition. Even if

> the doctrine of res ipsa loquitur were applicable, there would be the impossibility of determining the defendant against whom the rule should be applied, since the two defendants are charged with separate and distinct acts of negligence. Would the jury be permitted arbitrarily to find that because a wing broke under the circumstances the Flying School furnished a defective ship, or that the ship was negligently operated by the LeTourneau Company? The doctrine of res ipsa loquitur does not supply the material answer that is requisite. Neither does the evidence. It was wholly impossible for the jury to have determined from the evidence, and the inferences reasonably to have been drawn therefrom, either that the ship was defective or that it was negligently operated by Le Tourneau. If the proven facts give equal support to each of two inconsistent inferences, then neither is established, and "judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitlted to recover".

138 F.2d at 341. The foregoing passage discloses that the court denied the applicability of the res ipsa on two grounds: first, because "there is no showing that accidents of this very nature cannot happen to the most skillful pilots in planes of the finest type and condition," and second, because the evidence did not permit the factfinder to choose, for purposes of fixing liability, between two defendants each of which was charged with "separate and distinct acts of negligence." As noted, Mobil urges that identical considerations require us to reverse the district court's judgment against it. We disagree.

A.

[5,6] The applicability of res ipsa to any species of accident depends in the first instance upon whether the mishap is of a type that ordinarily does not occur in the absence of negligence. As this court noted in an early case refusing to apply res ipsa to the explosion of a jet engine:

> Res ipsa loquitur is a rule based upon human experience and its application to a particular situation must necessarily vary with human experience. A situation to which the doctrine was not applicable a half century ago because of insufficient experience or lack of technical knowledge, might today fall within the scope of the rule, depending upon what experience has shown.

Williams v. United States, 5 Cir. 1955, 218 F.2d 473, 476. In 1943 when we decided *LeTourneau* air travel perhaps still seemed so inherently risky that people generally believed that aviation accidents could and did occur without human or mechanical failure. We think experience now teaches otherwise. Major improvements in design and manufacturing technology, in pilot training, and in ground control, communications, and navigational aids, among other things, have combined to give air travel an estimable safety record. By 1964 one distinguished commentator could write that "all the later cases" support the application of res ipsa to airplane crashes. W. Prosser, Law of Torts §39, at 220-21 (3d ed. 1964); *cf.* Annotation, 6 A.L.R. 2d 528. Our court has only recently implied that this use of res ipsa is well settled. *Kelly v. American Airlines, Inc.*, 5 Cir. 1975, 508 F.2d 1379, 1380 & n. 1. *See also* United States v. Johnson, 5 Cir. 1961, 288 F.2d 40, 45. Logic, experience, and precedent compel us to reject the argument that air-

plane crashes ordinarily occur in the absence of default by someone connected with the design, manufacture, or operation of the craft. *Accord, Cox v. Northwest Airlines, Inc.*, 7 Cir. 1967, 379 F.2d 893, *cert. denied*, 1968, 389 U.S. 1044, 88 S.Ct. 788, 19 L.Ed. 2d 836. Moreover, we see no meaningful distinction for these purposes between a fixed wing plane and a helicopter. Accordingly, we reject the first branch of Mobil's argument.

B.

[7,8] Mobil also argues, however, that "the application of res ipsa to one defendant and not to another requires that the circumstances surrounding the injury render it more probable that the injury was due to that defendant's negligence, than that of the other defendant." (Mobil Brief at 21-22). We entertain no doubt that this contention correctly states the law. *See, e.g., Dowdell v. U.S. Industries, Inc.*, 6 Cir. 1974, 495 F.2d 641, 644; *Domany v. Otis Elevator Co.*, 6 Cir. 1966, 369 F.2d 604, 613; W. Prosser, Law of Torts § 39, at 218 (4th ed. 1971). Moreover, cases can be found employing this reasoning to deny recovery in aircraft crash cases. *See Morrison v. LeTourneau, supra, Campbell v. First National Bank*, D.N.M. 1973, 370 F.Supp. 1096, 1098-99; *cf. Kelly v. American Airlines, Inc., supra; Kelly v. American Airlines, Inc., supra; Kelley v. Central National Bank of Richmond*, E.D. Va. 1972, 345 F.Supp. 737, 741; *Davies Flying Service v. United States*, W.D. Ky. 1953, 114 F.Supp. 776. It does not follow, however, that res ipsa loquitur dropped from this case as a matter of law when plaintiffs and Mobil offered evidence suggesting that a party other than Mobil may have been responsible for the accident. Every possible alternative cause of the injury need not be totally excluded for res ipsa to apply; all that is

necessary is that the likelihood of other causes be sufficiently reduced so that the factfinder may reasonably conclude from a preponderance of the evidence that the fault, if any, is attributable to the party against whom the doctrine is employed.[10]

For example, in *Colditz v. Eastern Airlines, Inc.*, S.D. N.Y. 1971, 329 F.Supp. 691, plaintiffs sued Eastern and Trans World Airlines for injuries suffered when airplanes operated by the two companies collided in mid-air. One issue before the court was whether plaintiffs could rely on res ipsa loquitur in attempting to make out their case. The airlines apparently argued that res ipsa was not available because the collision might have been caused by the negligence

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10. The Restatement (Second) of Torts §328 (d) states, in pertinent part:

> (1) It may be inferred that harm suffered by the plaintiff is caused by the negligence of the defendant when . . .
> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence . . . .. (evidence added)

The comment to subsection (b) expands on this idea:

> It is never enough for the plaintiff to prove that he was injured by the negligence of some person unidentified. It is still necessary to make the negligence point to the defendant. On this too the plaintiff has the burden of proof by a preponderance of the evidence; and in any case where there is *no doubt* that it is at least equally probable that the negligence was that of a third person, the court must direct the jury that the plaintiff has not proved his case. *Again, however, the plaintiff is not required to exclude all other possible conclusions beyond a reasonable doubt, and it is enough that he makes out a case from which the jury may reasonably conclude that the negligence was, more probably than not, that of the defendant.* (emphasis added)

See also F. Harper & F. James, The Law of Torts § 19.7 (1956).

of the air traffic controllers in charge of directing the flight paths of the two aircraft. Despite substantial arguments offered to demonstrate the controllers' negligence, *see White v. Trans World Airlines, Inc.*, S.D.N.Y 1970, 320 F.Supp. 655, the district judge rejected the airlines' argument by noting that he had exonerated the controllers in a separate case arising out of the same accident. 329 F.Supp. at 693. In the instant case the district judge took up the issue of Mobil's and Bell's culpability in the same proceedings, but he considered Mobil's potential liability only after concluding that the plaintiffs had not carried their burden against Bell.

Even more in point is a recent decision by the Supreme Court of Texas. Plaintiffs sued Mobil Chemical Company for injuries they received when a pipeline safety valve at a Mobil plant ruptured and allowed acetic acid vapor to escape into the atmosphere. Plaintiffs were working near the site of the rupture and inhaled the vapor, causing the respiratory damage for which they sued. To establish Mobil's negligence, plaintiffs relied upon res ipsa. Mobil responded by adducing testimony indicating that the cause of the rupture was a structural defect in the valve -- for which the valve's manufacturer, if anyone, would be liable. The Texas court wrote:

> While the jury was certainly entitled to believe. . . . [Mobil's] explanation, it was not compelled to . . . Since the same mechanism had worked properly the day before, the jury could have concluded that any structural weaknesses were more probably caused by Mobil's maintenance personnel. . . than by causes prior to Mobil's control of the Unit. The jury also could have believed that Mobil's testing procedures were inadequate or negligently followed if it did not discover such structural

weaknesses before pumping acid at high pressure through the system. In short, the jury could still reasonably infer from the circumstances of the accident that the accident was probably caused by Mobil's negligence.

Mobil Chemical Co. v. Bell, 517 S.W. 2d 245, 254 (Tex. 1974).

[9] In the instant case the district judge noted the evidence of (1) slipshod inspection practices by Mobil mechanics, (2) flights by Mobil pilots in excess of the recommended maximum airspeed for the helicopter, and (3) past "hot-rodding" by the Mobil pilot who died in this crash. Although he could not attribute the accident to any one of these causes, Judge Scott concluded that as to Mobil "the total effect of the evidence, affords a reasonable inference of fault." 357 F.Supp. at 1174. The record gives us no cause to doubt that the district judge took into account the strength of the evidence against Bell in assessing the "total effect of the evidence" against Mobil. Thus, no particular significance attaches, for instance, to the judge's couching his holding as to *Bell* in terms of "insufficient" rather than "no" evidence. In fact, Judge Scott's discussion of Mobil's inspection practices and the nature of the cracks that appeared in the tailbooms of other Jet Rangers suggests that he believed that even if the booms were defective from a maintenance viewpoint, they could have become a flight safety hazard only if the operator's inspection and repair practices were grossly negligent. Hence, his reasoning may have proceeded along lines identical to those the Supreme Court of Texas found permissible for the jury in *Mobil Chemical Co. v. Bell, supra.*

In any event, we may reverse the lower court's finding of

negligence only if we are convinced that it is clearly erroneous. *See Kennedy v. Henderscheid*, 5 Cir. 1973, 490 F. 2d 85. We are not left with the definite and firm conviction that Judge Scott erred in the inferences he drew from the circumstances of this case or in his conclusion that Mobil failed to rebut those inferences. *Compare Stevens v. Barnard*, 10 Cir. 1975, 512 F.2d 876, 879-81, with *Krause v. Sub-Aviation, supra.* Consequently, we affirm the judgment against Mobil.

IV.

The representatives of James Nation, another passenger who died in the crash of the Jet Ranger, urge us to reverse the lower court's holding that they can recover only under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The district court found that at the time of his death Nation was employed by Mobil on a fixed drilling platform; hence, as a matter of law, he was not a seaman. Consequently, the court disallowed any claim under the Jones Act.[11] Nation's representatives, however,

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11. Section 4(c) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333(c), makes the Longshoremen's and Harbor Workers' Compensation Act applicable "with respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section . . .." Subsection (b) covers "any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources. . . of the subsoil and seabed of the outer Continental Shelf." Moreover, we have construed § 1333(c) to apply to injuries occurring as a result of operations described in subsection (b) without regard to the physical situs of the injury. *National v. Morris*, 5 Cir. 1973, 483 F.2d 577, 584, cert. denied, 1973, 414 U.S. 1071; 94 S.Ct. 584, 38 L.Ed. 2d 477; Bertrand v. Forest Co., 5 Cir. 1971, 441 F.2d 809, cert. denied, 1971, 404 U.S. 883, 92 S.Ct. 106, 30 L.Ed. 2d 107; *cf. In re Dearborn Marine Serv., Inc.*, 5 Cir. 1974, 499 F.2d 263, 271-77 (law applicable to suits

introduced evidence that Nation spent much of his time during the two years before his death working on submersible drilling rigs, which this court has held are Jones Act vessels. Moreover, the evidence also suggested that Mobil assigned Nation to the fixed drilling platform simply as a temporary replacement for a vacationing co-worker. Under these circumstances it is argued that Nation achieved the status of a Jones Act seaman because of his predominant employment on submersible drilling barges and despite temporary assignments by Mobil to nonseaman employment.

[10] In *Offshore Company v. Robison*, 5 Cir. 1959, 266 F.2d 769, our court held that to claim the status of seaman an injured workman must convince the factfinder that he was, inter alia:

(Footnote 11 continued)
against third parties for platform-related injury occurring on the high seas). Finally, the LHWCA provisions adopted by OCSLA are the *exclusive* remedy of the claimant against his employer. 33 U.S.C. §905.

Section 4(c) of the Act also provides, however, that "[f]or the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section -- (1) the term 'employee' does not include a master or member of a crew of any vessel . . ." Accordingly, we have held that OCSLA offers no obstruction to recovery by a Jones Act seaman for injuries occurring in connection with subsection (b) operations. *Noble Drilling Corp. v. Smith*, 5 Cir. 1969, 412 F.2d 952, cert. denied, 1969, 396 U.S. 906, 90 S.Ct. 221, 24 L.Ed. 2d 182. *See also Smith v. Falcon Seaboard, Inc.*, 5 Cir. 1972, 463 F.2d 206, cert. denied, 1972, 409 U.S. 1085, 93 S.Ct. 688, 34 L.Ed. 2d 672.

The implication of these statutes and decisions for Nation's representatives is that as against Mobil they may recover damages for their decedent's death, which occurred as a result of drilling operations on the outer Continental Shelf, only if Nation was a "member of a crew of any vessel," *i.e.*, a Jones Act seaman. *See Noble Drilling Corp. v. Smith, supra*, at 954-56.

> assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel.

266 F.2d at 779. Later cases have established the proposition that a workman may claim seaman's status despite being stationed on several different vessels during the course of his employment. *Braniff v. Jackson Avenue -- Gretna Ferry, Inc.*, 5 Cir. 1960, 280 F.2d 523, 528. See also *Magnolia Towing Co. v. Pace*, 5 Cir. 1967, 378 F.2d 12, 13; *Taylor v. Packer Diving and Salvage Co.*, E.D. La. 1971, 342 F.Supp. 365, 371, aff'd, 5 Cir. 1972, 457 F.2d 512. Moreover, once it is established that the claimant is a seaman, the Jones Act permits recovery even if he sues for injuries received while off ship and engaged in temporary work for his employer unrelated to service of the ship. *See Braen v. Pfeifer Oil Transp. Co.*, 1959, 361 U.S. 129, 80 S.Ct. 247, 4 L.Ed. 2d 191; *Crafton v. Tennessee Valley Sand & Gravel Co.*, 5 Cir. 1969, 408 F.2d 1096; *Taylor v. Packer Diving and Salvage Co., supra; cf. Doucet v. Wheless Drilling Co.*, 5 Cir. 1972, 467 F.2d 336, 338-39 ("The only requirement is that the seaman be 'doing the work of his employer pursuant to his employer's orders.' ")

[11-13] The lower court here found as a fact that Nation was not a seaman on the date of his death. Generally, "the determination of whether an individual is a 'seaman' within the purview of the Jones Act or the maritime law is a purely factual matter for determination by the jury or factfinder." *Ross v. Mobil Oil Co.*, 5 Cir. 1973, 474, F. 2d 989, 990. Nevertheless, it is clear that Judge Scott's finding on this issue was tainted by a misapprehension of

controlling legal principles set out above, for he ruled as to Nation "that as a matter of law his seaman's status is determined by the situs of his work at the time of his injury." 357 F.Supp. at 1177. As we have just indicated, however, situs of work is *not* determinative in a Jones Act case.[12] Accordingly, we have reviewed the evidence on Nation's employment status free of the constraints of the clearly erroneous rule. *See Stark v. Shell Oil Co.*, 5 Cir. 1971, 450 F.2d 994, 997; *Continental Motors Corp. v. Continental Aviation Corp., supra.*

[14] Our examination of the record discloses uncontradicted evidence (1) that during the two years prior to his death James Nation spent all but a small fraction of his working time on Mobil's submersible drilling barges, and (2) that Mobil assigned Nation to the fixed platform where he had worked during the week preceding his death as a presumably temporary replacement for a vacationing foreman. The record gives use no cause to believe that Nation's general pattern of employment would have changed substantially had he lived. Given these circumstances, we think that the undisputed evidence requires a finding that Nation was a seaman despite intermittent temporary assignments to fixed platforms as the course of drilling operations required.[13]

12. Although it is true that a worker does not forever remain a seaman solely by virtue of having once been one, *see Desper v. Starved Rock Ferry Co.*, 1952, 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205, it does not follow that a seaman automatically loses his status when he is temporarily assigned by his employer to duties off the vessel. *Cf. Keener v. Transworld Drilling Co.*, 5 Cir. 1972, 468 F.2d 729. He retains his status so long as he "perform[s] a substantial part of his work on the vessel." Offshore Co. v. Robison, supra, at 779.

13. There can be no question here as to the second element of the *Robison* test, contribution to "the function of the vessel or to the accomplishment of its mission," 266 F.2d at 779, because as a drilling foreman Nation plainly contributed to the mission of the drilling barges upon which he was normally stationed.

Thus, since Mobil had assigned Nation to work on the fixed platform from which the fatal helicopter took off,[14] his representatives are entitled to maintain a Jones Act action for his death. We have summarily affirmed a district court that permitted a suit under the Jones Act on facts substantially similar to those involved here. *Taylor v. Packer Diving and Salvage Co., Inc., supra.* Accordingly, we reverse the district court's judgment as to Nation's representatives, direct entry of judgment in their favor under the Jones Act,[15] and remand for a determination of damages.

V.

[15] The representatives of Shinn and Higginbotham argue that the district court erred in certain respects concerning its determination of the amount of damages to which they were entitled.[16] Mobil also objects to a portion of the lower court's damages computations. The individual plaintiffs' first contention may be disposed of quickly. The court did not err in denying any recovery for the conscious pain and suffering of Shinn and Higginbotham before their deaths. There is simply no evidence in the record to support such an award. *See In re Dearborn Marine Serv., Inc., supra*, at 288.

[16, 17] More difficult is the question whether the district court erred in using a 5% annual straight line estimated

14. That is, Nation plainly was within the scope of his employment.

15. We have already approved the district court's finding that Mobil's negligence probably caused the crash.

16. The district judge's opinion on damages is reported at 360 F. Supp. 1140.

salary increase to calculate the probable future earnings of Marshall Higginbotham.[17] Mobil contends that this method of calculation amounts to an increase based upon inflation. Judge Scott specifically stated that "[i]n determining the amount of the awards for loss of future earnings, we did not take into consideration the decreasing purchasing power of the dollar." 360 F. Supp. at 1150. In so holding the judge correctly anticipated our recent *en banc* holding in *Johnson v. Penrod Drilling Co.*, 5 Cir. 1975, 510 F.2d 234. Nevertheless, Mobil argues that the 5% straight line annual increase amounted to a hidden inflation-based award because "it is common experience that annual 'raises' are for the most part cost of living wages." Mrs. Higginbotham rejoins that it is "speculative and inaccurate" to assume that all pay raises are cost of living increases rather than awards in "recognition of performance and experience."

Our cases appear conclusive on this problem. For example, in *Petition of Canal Barge Co.*, N.D. Miss. 1971, 323 F. Supp. 805, the district court held that:

> [Plaintiff's decedent] might have reasonably anticipated certain increases in his future earnings; such increases may fairly be calculated at the rate of 2% per year to the end of his work-life expectancy, which is to be also discounted. . . .

17. No similar problem arose as to James Shinn. Mobil, his employer, provided exact information on the pay raises to which he would have been entitled. Even more importantly, Shinn would have retired within a few months of the lower court's judgment, thus mitigating any difficulties as to post-judgment increases in earnings. 360 F. Supp. at 1146.

Id. at 814. On appeal this court initially approved the 2% factor, but treated it as a recovery for the "anticipated annual increase in the cost of living." *Canal Barge Co. v. Griffith*, 5 Cir. 1973, 480 F.2d 11. 28, *rev'd on this point on petition for rehearing*, 5 Cir. 1975, 513 F.2d 91·1. Likewise, in *Johnson v. Penrod Drilling Co.*, supra, the court treated the following finding as an award based upon inflationary factors:

> The wages of one performing the type of work that plaintiff was performing at the time of the accident in issue is likely to increase at the annual rate of 4.8% per annum. This percentage of annual increases in wages was the rate of increase of such wages from 1946 to 1969; and was the rate of annual increases which had held good from the year 1900.

510 F.2d at 238 In *Law v. Sea Drilling Corp.*, 5 Cir. 1975, 510 F.2d 242, the court similarly characterized this finding:

> Cost of living increases and inflation would cause an increase in loss of income from the death of Wesley Law at a rate of 2% per year . . .. Wesley Law was reasonably to be expected to increase his income based on the continued rise in his income reflected by his position and income tax returns.

510 F.2d at 251 & n.33. Finally, in *Robertson v. Douglas Steamship Co.*, 5 Cir. 1975, 510 F.2d 829, the court relied on *Johnson* to reverse an award based upon "loss of future wage increases or inflation or decrease in the purchasing power of money." *Id.* at 836. Manifestly, these cases make

no sharp distinction between "future wage increases"and outright allowances for the effect of inflation.

The Third Circuit has recently noted the close relationship between expert testimony purporting to project future pay raises and explicit inflationary considerations: "Although offered in terms of continuing increases in wage rates, as opposed to a continuing decline in the value of the dollar, the testimony in question reflects a continuing inflationary spiral." *Hoffman v. Sterling Drug, Inc.*, 3 Cir. 1973, 485 F.2d 132, 143, *cf. Magill v. Westinghouse Electric Corp.*, 3 Cir. 1972, 464 F.2d 294, 299-301. *See also* Brooks v. United States, D.S.C. 1967, 273 F.Supp. 619, 627-28. We believe that *Johnson v. Penrod Drilling Co.* and its progeny likewise stand for the proposition that courts may not simply assume that projected wage increases--whether calculated from the decedent's past earning experience or by some other means--would have been granted solely in "recognition of performance and experience." To the contrary, to recover at all for future raises plaintiff must bear the difficult burden of proving what portion of the increases would have been given other than as an automatic hedge against inflation.

Mrs. Higginbotham's economist arrived at the 5% figure for estimating Marshall Higginbotham's probable future annual wage increases by calculating the average annual percentage increases in Higginbotham's salary from the time he began working for Baxter Drilling Company (his employer at the time of the accident) until his death. App. at 2414-15. Included in this calculation was the assumption that Higginbotham, "a very capable tool pusher," would have maintained his past employment record. Nevertheless, the evidence sheds no real light on the basis of Higginbotham's

past raises -- *i.e.* whether they were cost of living bonuses or rewards for productivity.[18] Accordingly, the lower court's award based upon the 5% future earnings factor cannot stand. In view of the recent developments in this area, however, fairness demands that we remand to allow Mrs. Higginbotham an opportunity to prove her damages from the loss of her husband's future earnings according to the standards set out in this opinion. It remains, of course, within the trial judge's discretion to reject any testimony concerning future wage increases as too speculative to support recovery. *Cf. Bach v. Penn Central Transp. Co.*, 6 Cir. 1974, 502 F.2d 1117, 1122; *Hoffman v. Sterling Drug Co., Inc., supra; Magill v. Westinghouse Electric Corp., supra; Rideaux v. Lykes Bros. Steamship Co.*, S.D. Tex. 1968, 285 F.Supp. 153, 156.

[18, 19] As a final point, the representatives of Shinn and Higginbotham allege that because of changes in the law after the district judge decided this case they are now entitled to recover for an element of damages denied them by Judge Scott -- namely, loss of society or loss of love and affection. The district court denied recovery for these damages in reliance on *Canal Barge Co. v. Griffith, supra.* Subsequently, however, the Supreme Court in effect overruled the relevant part of that case by concluding that under the

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18. The salary increases given Higginbotham's replacement as tool pusher were used by the district court to calculate the decedent's lost wages from the date of his death until the date of judgment. This evidence arguably eliminated the more troublesome problems concerning the speculativeness of that award. *Johnson* and the cases following it teach, however, that pre-judgment increases, paid either to the decedent before his death or later to his replacement, may not be applied mechanically to calculate *future* wage increases, because the employer's wage policy may be tied to the rate of inflation or to the cost of living index. *Cf. Eason v. Weaver*, 5 Cir. 1973, 484 F.2d 459.

nonstatutory maritime wrongful death action announced in *Moragne v. State Marine Lines*, 1970, 398 U.S. 375, 90 S.Ct. 1771, 26 L.Ed.2d 339, a decedent's dependents may recover damages for loss of society when death occurs in a state's navigable waters -- an area not covered by DOHSA. *Sea-Land Services, Inc. v. Gaudet*, 1974, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9. *See Canal Barge v. Griffith*, 5 Cir. 1975, 513 F.2d 911, 912 (on rehearing); *Skidmore v. Grueninger*, 5 Cir. 1975, 506 F.2d 716, 727-29.

Judge Scott found that both the Shinn and Higginbotham representatives were entitled to recover under the *Moragne* maritime wrongful death remedy; he refused to award damages for loss of society only because, as just noted, the law of the circuit at that time was that loss of society was not a compensable item in a *Moragne* action. In the course of his discussion Judge Scott concluded that *Moragne* is fully applicable to deaths occurring on the high seas, despite the existence of the remedy provided for by the Death on the High Seas Act. 357 F.Supp. at 1175. Although earlier reserving the question of the applicability of *Moragne* on the high seas, *In re Dearborn Marine Serv., Inc., supra* at 270 n.12, a panel of this circuit has since held "that *Moragne* applies not only to navigable waters of the States, but to the High Seas as well, including the area defined in DOHSA," and have accordingly awarded damages for loss of society for a death occurring beyond a marine league from shore. *Law v. Sea Drilling Co.*, 5 Cir. 1975, 510 F.2d 242, 250, *reh. denied, mofidied in part*, 5 Cir, 523 F.2d 793 (1975).[19] On remand, therefore the repre-

19. *Contra, Barbe v. Drummond*, 1 Cir. 1974, 507 F.2d 794, 800-02. If presented as an original matter, the members of this panel would be constrained to reach the result of the First Circuit in *Barbe*. While both *Barbe* and *Law* are undoubtedly correct in extending the right to recover for pain and suffering to deaths occurring on the high seas, the opinion in *Law* fails to distinguish between damages recoverable as survival items and as wrongful death items. Conscious pain and suffering is traditionally -- and logically -- a survival item. Loss of love and affection, or loss of society, on the other hand, is traditionally a wrongful death item. The members of the panel would read *Moragne* to say that DOHSA is the exclusive *wrongful death* remedy outside of state territorial waters. The decision in *Law*, however, forecloses this issue for the panel.

sentatives of Shinn and Higginbotham should be permitted to recover this item of damages.[20]

Affirmed in part; reversed in part and remanded.

GODBOLD, Circuit Judge, concurring in part and dissenting in part:

I agree with Judge Thornberry except for that portion of Part V of his opinion that relates to Higginbotham's future earnings.

On the res ipsa loquitur point I add the following comments. We do not overrule either *Morrison v. LeTourneau*, 138 F.2d 339 (CA 5, 1943), or *Williams v. U.S.*, 218 F.2d 473 (CA5, 1955). *Morrison* was a 1943 decision concerning the 1940 crash of a two place "cub" plane. Res ipsa was inapplicable for several reasons. It was unknown whether the defendant's agent or the other person in the plane was in control as pilot; there were severe winds at the scene; there was no showing that accidents of the type involved could not happen to the most skillful pilots in planes of the finest

20. If the representatives of James Nation can establish their right to recover under *Moragne*, their recovery under the Jones Act will not bar an award of damages for loss of society. *Landry v. Two R. Drilling Co.*, 5 Cir. 1974, 511 F.2d 138; *McDonald v. Federal Barge Lines, Inc.*, 5 Cir. 1974, 496 F.2d 1376.

type and condition. As to the first two elements, they are not present in the instant case. As to the third, in *Williams* our court was concerned with the 1952 midair explosion of a B-47 jet bomber. We declined to apply res ipsa on the basis that the court had no knowledge, judicial or otherwise, of what would cause a jet plane to explode in midair flight. *Williams* recognized, however, that each case seeking to invoke res ipsa must stand or fall upon its own facts; that a situation in which the doctrine was previously inapplicable because of insufficient experience or lack of technical knowledge may currently fall within the scope of the rule; and that experience concerning the particular situation may be so uniform and well established that it is not necessary that it be "proved" by extraneous evidence.

Many of the cases concern common carriers. Mobil is not a common carrier, but its use of a fleet of helicopters as substitutes for crew boats, regularly moving men and equipment from shore to offshore drilling sites and back again, makes it someting very close to a common carrier insofar as analysis of res ipsa is concerned. The ensuing regularity of operation with few significant incidents represents the kind of change in technology which *Williams* refers to, and it is a change which need not be adduced by specific proof but which judges in their experience may recognize. Judge Holtzoff discussed the change in technology concept in *Smith v. Pennsylvania Central*, 76 F.Supp. 940 (D.D.C. 1948). He pointed out that the argument that airplane accidents may be due to mysterious and unknown causes might have been applied to the railroads in their infancy, but that res ipsa was applied to them as early as 1844.

I dissent from the holding, in part V, that it was error for the trial court to calculate Higginbotham's future earnings by using 5% annual straight line estimated salary increases. *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (CA5, 1975), was bad enough. Now it is extended. Here, the trial court's result was not based on an economist's projection of future economic cycles but upon circumstantial evidence consisting of past wage increases (those of Higginbotham and of the successor in his job) from which one may infer that the pattern of a sufficiently long period in the past is more likely than not to be the pattern of the future. A court should be entitled to conclude that a past pattern of earnings increases is of sufficient duration and uniformity that it is a reliable basis for an inference with respect to the future, even though the increases embraced in that pattern may contain cost of living increments It seems to me that this is what the trial judge did in accepting the past track record and in holding that he was not taking into consideration decreased purchasing power of the dollar. I would, therefore, affirm on this issue.

In innumerable other contexts we accept the events of the past as the basis for an inference as to what the future will hold. Indeed we often insist upon it as the necessary predicate for an opinion respecting the future. Thus, if the plaintiff's back has hurt for two years since the accident, the doctor is allowed to opine that it will continue to hurt, and we never pause to doubt that this is permissible. We accept, indeed insist upon, projecting life expectancy upon the past record with respect to millions of people, although plaintiff may be (and almost certainly will be) an exception to the projected figure. The examples are endless. Yet we would not permit consideration of evidence that a particular plaintiff had received a $200 per year increase in pay every year for 20 years, unless he could divide it up into "productivity" pay and "economic change pay". In this single area of projecting future earnings we deny ourselves

the best evidence available on the asserted ground that it is not sufficiently reliable, and, in the name of reliability we mandate the artificial conclusion that one will earn the rest of his life what he is earning on the day he is killed or injured. The only thing certain about this is that it is certain to be wrong.

GEE, Circuit Judge concurring in part and dissenting in part:

I fully concur in Parts I and II of Judge Thornberry's thorough and well-reasoned opinion. I am unable to concur, however, in the application of the doctrine of res ipsa loquitur made in Part III, and hence would not reach the matters discussed thereafter. In this circuit, the doctrine of res ipsa loquitur applies in an airplane crash case only if a preponderance of the evidence shows that the *particular accident in question* would ordinarily not have occurred in the absence of defendant's negligence.[1] But the opinion would approve application of the doctrine here by overruling longstanding Fifth Circuit law on the ground that airplane crashes no longer "ordinarily occur" without negligence. *Supra* at slip opinion p. 753,____F.2d at p.___. If

1. *Compare Morrison v. LeTourneau Co.*, 138 F.2d 339, 341 (5th Cir. 1943) ("The doctrine . . . cannot apply in cases of this sort, because *there is no showing* that accidents of this very nature cannot happen [without negligence]."") (emphasis added), with *Williams v. United States*, 218 F.2d 473, 476 (5th Cir. 1955) (per curiam) ("[E]ach case seeking to invoke this doctrine must stand or fall upon its own facts."), and *United States v. Johnson*, 288 F.2d 40, 45 (5th Cir. 1961) ("[P]laintiffs had produced enough evidence to show that [ordinarily] these accidents would not have occurred if [defendants had been diligent.]").

Part III of the opinion really intends this, and if the pronouncement be taken at face value, a sudden and massive shift in our circuit's airplane-crash liability law would occur. Henceforth, as examples, when an aircraft in apparently good working condition vanishes during an over-water flight, or a fishing boat disappears in calm weather without radio transmission or siginificant wreckage, its operator will be liable.

The opinion of the court below attempts no factfindings about whether at the present time airplane accidents in genearal ordinarily occur without negligence; moreover, the record contains nothing approaching the comprehensive evidence of a general nature sufficient to support such a conclusion. If the trial court had meant to make such findings on the basis of the discrete evidence in this particular case, they would rest on an evidentiary basis no sounder--and be no more appropriate--than a finding that all red-headed men are bank robbers derived from evidence that John Smith, a red-headed man, robbed a bank. And if we are finding such facts on disputed evidence, as we should not be, our finding is precisely as groundless when based, as it is, on the same record. If on the other hand, we are announcing law, we are equally wrong to do so and for at least two reasons.

First, as a matter of common sense, it is plain that not all mistakes in judgment are negligent ones. General experience teaches that Hobson's choices arise in all activities subject to the elements, so that the pilot of a properly-functioning aircraft may take the path that leads to death or injury for himself and his passengers without carelessness. As Judge Tuttle once warned:

> It is not true that [an airplane] crashes only if the pilot is *negligent*. Such crashes may be attributable to many things, such as structural defects, conditions of weather, excusable error in pilot judgment falling far short of pilot *negligence*, and the like.

United States v. Johnson, 288 F.2d 40, 46-47 (5th Cir. 1961) (dissenting opinion) (emphasis in original).

Second, on the procedural side, nothing is more firmly established in this circuit than the principle that decisions by a panel of our court are to be overturned only by the Supreme Court or by the court sitting en banc, not by a later panel. Under *LeTourneau*, as Judge Thornberry's opinion avows (Part III, preamble), res ipsa is not presumptively or generally applicable in our circuit to accidents of this nature. And if the conditions of air travel have so improved in the time since *LeTourneau* as to make it so applicable, it is the en banc court that must say so.

Doubtless the res ipsa doctrine will apply in a proper case where specific findings ruling out non-negligent causes can be and have been made on sufficient evidence. This is no such case. As noted, no evidence supports even a general finding that this particular accident would not ordinarily have occurred without negligence. To be sure, the trial judge ostensibly made such a finding, *Higginbotham v. Mobil Oil Corp.*, 357 F.Supp. 1164, 1174 (W.D. La. 1973), but he also found the evidence so insufficient that no probable cause of the accident could be determined. *Id.* at 1172. And four pages of discussion were necessary for him to dispose, in the face of highly conflicting expert testimony, of the structural failure theory, which was rejected at least in part because "very little (absolutely none

of the main power and control units or instrument panel, no flight plan, no communication, no performance record, taped or otherwise) of the aircraft remained and was available for analysis." *Id.* at 1167-68. In other words, there was not enough left of the craft to form a reliable basis for ruling in *or out* structural failure as a cause of the crash. In short, countless possibilities could explain the tragedy in this case, and to allow an inference of fault here is to tolerate blind speculation.

Even if res ipsa were appropriate, the lower court applied the wrong standard of proof. As the majority opinion points out, an inference that a defendant was negligent is permitted only when the likelihood of *all* other possible causes is sufficiently low that the factfinder reasonably concludes from a preponderance of the evidence that defendant *must* have been negligent. Here the finder of fact applied res ipsa after finding only that the evidence as a whole "afford[ed] a reasonable inference of fault." 357 F.Supp. at 1174. The factfinder may reasonably discern several possible explanations, but only a single most probable one.

Thus, the lower court adopted the wrong standard in applying an inappropriate doctrine. I would reverse on the res ipsa loquitur issue. Since this is not to be, however, I concur in Judge Thornberry's disposition of the damages questions discussed in Part V of the majority opinion.

APPENDIX D

ORDER DENYING PETITION FOR REHEARING

Filed: March 7, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74 - 1275

MRS. FRANCIS NELL HIGGINBOTHAM, Admx., etc., of
MARSHALL K. HIGGINBOTHAM, Deceased, etc., et al.,
Plaintiffs-Appelless, Cross-Appellants
Versus
MOBIL OIL CORPORATION, et al.,
Defendants-Appellants, Cross-Appellees

* * * * *

MRS. WANDA MOORE LONG, Admx. of the Estate of
Deceased JOSEPH C. LONG, JR., etc.,
Plaintiff-Appellant
Versus
BELL HELICOPTER CO., etc.,
Defendant-Appellee

* * * * *

JEANETTE LeBLANC NATION, Personal Representative
for ELLA MENARD NATION and ROY GLEN NATION,
Plaintiffs-Appellants
Versus
TEXTRON INDUSTRIES, INC., etc., et al.,
Defendants-Appellees

MRS. ARLINE J. SHINN, Individually, etc., et al.,
Plaintiffs-Appellants
Versus
MOBIL OIL CORPORATION and BELL HELICOPTER,
Defendants-Appellees

Appeals from the United States District Court for the
Western District of Louisiana

ON PETITIONS FOR REHEARING AND PETITIONS
FOR REHEARING EN BANC
(Opinion January 13, 1977, 5 Cir., 197__, __F.2d__).

Before THORNBERRY, GODBOLD, and GEE, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing filed by Mobil Oil Corporation and Mrs. Francis Nell Higginbotham are DENIED and no member of this panel or judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), their petitions for rehearing en banc are DENIED.

The Petition for Rehearing filed by Mrs. Wanda Moore Long is DENIED.

Judge Godbold would grant the petition for rehearing of Higginbotham for the reasons set forth in his earlier dissenting-in-part opinion.

Judge Gee would grant the petition for rehearing of Mobil for the reasons set forth in his earlier dissenting-in-part opinion.

APPENDIX E

JUDGMENT OF UNITED STATES COURT OF APPEALS - FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-1275

D.C. Docket No. CA 13-954, ET AL

Mrs. Francis Nell HIGGINBOTHAM, Admx., etc., of Marshall K. Higginbotham, Deceased, etc., et al. Plaintiffs-Appellees Cross-Appellants,

v.

MOBIL OIL CORPORATION, et al., Defendants-Appellants Cross-Appellees. . . . . .

Mrs. Wanda Moore LONG, Admx. of the Estate of Deceased Joseph C. Long, Jr., etc., Plaintiff-Appellant

v.

BELL HELICOPTER CO., etc., Defendant-Appellee

Jeanette LeBlanc NATION, Personal Representative for Ella Menard Nation and Roy Glen Nation, Plaintiffs-Appellants

v.

TEXTRON INDUSTRIES, INC., etc., et al., Defendants-Appellees

Mrs. Arline J. SHINN, Individually, etc., et al., Plaintiffs-Appellants,

v.

MOBIL OIL CORPORATION and Bell Helicopter, Defendants-Appellees.

Appeals from the United States District Court for the Western District of Louisiana

Before THORNBERRY, GODBOLD and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana,and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part, and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiffs, Higginbotham, Long, and Nation, and defendant, Mobil Oil Corporation, pay to defendant, Bell Helicopter Company, the costs on appeal to be taxed by the Clerk of this Court;

It is further ordered that plaintiff, Higginbotham, be condemned to pay one-half of the costs on appeal to be taxed

by the Clerk of this Court and that defendant, Mobil Oil Corporation, be condemned to pay one-half of said costs;

It is further ordered that plaintiff, Shinn, be condemned to pay one-half of the costs on appeal to be taxed by the Clerk of this Court; and that Mobil Oil Corporation be condemned to pay one-half of said costs;

It is further ordered that defendant, Mobil Oil Corporation pay to plaintiff, Nation, the costs on appeal to be taxed by the Clerk of this Court.

January 13, 1977

GODBOLD, Circuit Judge,concurring in part
and dissenting in part;

GEE, Circuit Judge, concurring in part
and dissenting in part.

Issued as Mandate:

Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76-1726

MOBIL OIL CORPORATION,
Petitioner

versus

FRANCIS NELL HIGGINBOTHAM,
Administratrix of the estate of Marshall K. Higginbotham, et al.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petition for Certiorari Filed June 6, 1977
Certiorari Granted October 3, 1977

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1. Chronoligical list of the important dates on which pleadings were filed, hearings held and orders entered ----- ii

2. Relevant pleadings and stipulation ---------- iii

3. Opinion and judgments ---------- iv

1. Chronoligical list of the important dates on which pleadings were filed, hearings held and orders entered.

This appendix covers three separate civil actions instituted by the respondents Higginbotham, Nation and Shinn and consolidated for trial.

March 30, 1971
The trial was held in Opelousas, Louisiana before the Hon. Nauman S. Scott, United States District Judge, Western District of Louisiana.

April 25, 1973
District Court's judgment on liability.

June 25, 1973
District Court's judgment on quantum.

January 13, 1977
Opinion of the United States Court of Appeal, Fifth Circuit.

March 7, 1977
Denial of rehearing by the United States Court of Appeal, Fifth Circuit.

June 6, 1977
Docketing of the Petition for Writ of Certiorari in this Court.

October 3, 1977
Order of this Court granting a Writ of Certiorari "limited to Question 1 presented by the petition."

2. Relevant pleadings and stipulation

Stipulation between petitioner and respondents

Court of Appeal Transcript, p. 347 L.4 to p. 354, L.10.

The following pleadings consisting of the libels or complaints of the respondents and the answers of the petitioner:

Case No. 13,954, Higginbotham
Libel from p. 1 to p. 19, L. 25 ---- 9
Answer p. 23 L. 15 to p. 29, L. 15. ---- 26

First Supplemental Complaint p. 41, L. 12 to p. 46, L. 25 ---- 33
Answer to First Supplemental Complaint, p. 39, L. 7 to p. 40, L. 15. ---- 38

Case No. 15,316, Nation
Complaint, p. 99, L. 1 to p. 102, L. 24. ---- 40
Answer and Cross Claim, p. 103, l. 1 to p. 106, L. 23. ---- 44

First Supplemental Complaint p. 121, L. 12 to p. 125, L. 5 ---- 48
Answer to First Supplemental Complaint, p. 118, L. 1 to p. 120, L. 15 ---- 52

Case No. 15,326, Shinn
Complaint p. 125, L. 7 to p. 130, L. 5 ---- 55
Answer p. 130, L. 6 to p. 133, L. 11 ---- 60

Amended Complaint, p. 158, L. 12 to p. 160, L. 15 ---- 63

Amended Complaint for Damages, p. 268, L. 1 to p. 269, L. 24. ---- 65
Answer to Amended Complaint for Damages, p. 271, L. 1 to p. 272, L. 10 ---- 67

3. Opinions and Judgments

The Opinion of the Court of Appeals is printed as Appendix C, p. A52 in the Petition for Writ of Certiorari

The District Court's opinion on Liability is printed as Appendix A, p. A1 of the Petition for Writ of Certiorari

The District Court on the subject of Damage is printed as Appendix B, at p. A32 of the Petition for Writ of Certiorari

STIPULATION BETWEEN PETITIONER AND RESPONDENTS

(Title omitted)

MR. BENJAMIN:

May it please the Court, the following facts are established by the pleadings and are stipulations or admissions of counsel:

On or about August 15, 1967, Bell Helicopter, Model 206A, Jet Ranger, Serial 46, Registered N 7846S, manufactured by Bell Helicopter Company and owned by Mobil Oil Corporation crashed in the Gulf of Mexico.

At the time of the crash, J.L. Shinn, Marshall K. Higginbotham and James E. Nation were passengers in the Helicopter and Joseph Clyde Long, Jr. was pilot and, as a result of the crash, all were caused to sustain fatal injuries.

Mobil Oil Corporation is a New York Corporation, having its principal place of business in the State of New York.

Bell Aerospace Corporation and Bell Helicopter Company, a division thereof, are Delaware corporations doing business in Louisiana.

Joseph Clyde Long, Jr., was born January 3, 1934 in Pulaski, Tennessee.

After graduating from high school, he entered the University of Tennessee in 1951 and remained enrolled there through 1952. He then enrolled in Middle Tennessee State College where he studied through 1953, at which time he

enlisted in the U.S. Navy in November of 1953, as an aviation cadet. He then served as a helicopter pilot for the U.S. Marine Corps from February 1955 through October 1957, at which time he was honorably discharged with the rank of First Lieutenant. During his service, he served fourteen months in the Far East.

Mr. Long married Wanda M. Long on December 18, 1954 and of this marriage two children were born, namely, Cynthia Lynn Long born April 13, 1959 and Joseph Kevin Long born February 1, 1957.

After his discharge from the service, Mr. Long returned to Middle Tennessee State College and in 1959 received a Bachelor of Science degree in science with a 2.94 overall average on a 4 point grading system.

After graduation, Mr. Long attended East Tennessee State College on a scholarship to study science education during the year 1960, and at the same time taught 9th grade General Science in Kingsport, Tennessee.

Mr. Long was employed as a helicopter pilot by Petroleum Helicopters, Inc., in August 1960 and remained employed in this capacity until November 1961, at a salary of $600.00 a month.

Mr. Long was employed by Mobil Oil Corporation as a helicopter pilot in November 1961 and he remained employed in this capacity until his death on August 15, 1967, at which time he was being paid a salary by Mobil Oil Corporation of $895.00 per month.

Mr. Long held FAA pilot certificate number 1304556, dated September 10, 1957, and held ratings for single engine land airplane, multi-engine land airplane and rotor craft. His flying time was 206 hours in single engine airplanes, 20 hours in multi-engine airplanes and 6174 hours and 15 minutes in rotor craft, for a total flying time of 6400 hours 15 minutes at the time of his death. In the N7846S, Mr. Long had flown 48 hours 50 minutes. Attached to and made part of this stipulation are reports of physical examinations of Mr. Long made by Dr. Mims Mitchell, Jr. of Lafayette, Louisiana, dated January 31, 1967, January 26, 1966, January 4, 1965 and January 2, 1964.

Bell Helicopter Company, hereinafter referred to as "Bell", is a Delaware Corporation, with its principal office at Fort Worth, Texas.

Bell is engaged in the business of designing, manufacturing, inspecting, repairing, assembling and selling helicopters, and in the course of its business, in the State of Texas designed, manufactured and sold to Mobil Oil Corporation, hereinafter referred to as "Mobil", a Bell helicopter, model 205A Jet Ranger, Registration number 7846S, for use by Mobil in connection with its operations for exploration and production of oil, gas, and other minerals, offshore from the State of Louisiana, and elsewhere in the Gulf of Mexico, for a net price of $98,967.00, as appears from copy of the original bill of sale annexed hereto and made part of this stipulation.

On August 15, 1967, at approximately 1:50 p.m., the N7846S departed Morgan City, Louisiana, with an ultimate destination of Block 215 Vermilion (Baxter Drilling Rig 3) situated in the Gulf of Mexico approximately 100 statute

miles south-southwest of Morgan City.

The helicopter was piloted by joseph Clyde Long, Jr., then acting in the course and scope of his employment by Mobil and carried four passengers; W.O. Keys, J.L. Shinn, J. Case and G. Hunt. The purpose of the flight was to effect a crew change of Mobil and Baxter Drilling Company (Mobil's contractors) personnel.

During the course of the flight, attempted radio contact with the helicopter was unsuccessful and an air search by Mobil and Petroleum Helicopters, Inc., was initiated at approximately 4:45 p.m.

At approximately 5:45 p.m. one of the Petroleum Helicopters, Inc. aircraft flying in the area located parts of N. 7846S floating in the water approximately 2.5 to 4 statute miles northeast of Block 215 Vermilion. All of this area is well beyond a marine league from the Shore of Louisiana.

The floating wreckage was recovered shortly thereafter and consisted of 8'3" of the tail boom with the tail rotor and fin assembly still attached and both floats, still attached to each crossover tube and a small bottom section of the cabin still attached to the forward cross tube. Also recovered were the cyclic stick, odd electrical gear, a seat and maps.

As a result of the crash, Joseph Clyde Long, Jr., J. E. Nation, J. L. Shinn and M. K. Higginbotham sustained fatal injuries, their bodies were never recovered, and no other aircraft parts were found. The water at the crash site is approximately 120 feet deep.

The total flying time of the N7846S prior to the crash was 165.45 hours.

All documents, photographs and other exhibits produced by Bell in response to discovery procedures and request by the parties, all exhibits attached to and made part of the various depositions of witnesses taken in connection with this case and all FAA photographs of the parts recovered are genuine and may be admitted into evidence without further authentication, subject to objections as to materiality, relevancy and admissibility.

James Lex Shinn was born on September 23, 1908 and died on August 15, 1967.

Arline Jones Shinn was born July 13, 1912.

Arline Jones Shinn and James Lex Shinn were lawfully married on March 5, 1931 and were living together at the time of Mr. Shinn's death. Both had been married but once and then to each other.

Of the marriage between Mr. and Mrs. Shinn, the following children were born; Patsy Fay Shinn, born October 27, 1933; Robert Phil Shinn, born November 9, 1937; Eldon Ray Shinn, born December 7, 1941; James Lynwood Shinn, Born January 25, 1944; John Eugene Shinn, born July 15, 1951; and Linda Arline Shinn, born October 20, 1955.

Until his death, James Lex Shinn had been employed by Mobil Oil Corporation for more than thirty years.

At the time of his death, James Lex Shinn was a toolpusher, earning $1,249.00 per month, plus room and board.

During the calendar year 1966, decedent, James Lex Shinn, received wages from Mobil Oil Corporation totaling $14,504.50, plus the value of room and board during the times when he worked offshore.

Plaintiff, Mrs. Arline Jones Shinn, is the duly appointed and qualified testamentary executrix of the Succession of J. L. Shinn as per Letters Testamentary issued to her by the Sixteenth Judicial District Court for the Parish of St. Mary, Louisiana, in proceedings bearing 8213 on the docket of the said Court.

James E. Nation was born in approximately 1910.

Ella Menard Nation was born on May 29, 1906.

James E. Nation and Ella Menard Nation were lawfully married in approximately 1939 and were living together at the time of Mr. Nation's death. Of the marriage, one child was adopted, he being Roy Glen Nation, who was born approximately in 1931, and is now of the age of majority. Both had been married but once, and then to each other.

At the time of his death, James E. Nation was a toolpusher for Mobil Oil Corporation and was earning approximately $1,100.00 per month.

Plaintiff, Jeanette LeBlanc Nation, is the personal representative for Ella Menard Nation, the surviving spouse and Roy Glen Nation, decedent's son and only child.

Marshall K. Higginbotham was born on February 15, 1925.

MR. THOMPSON:

Pardon me just a minute on that stipulation, I realize that there is an error in the marital situation of Mrs. Nation. I will correct that at a later date, Your Honor. But I wanted to make a note in the record at this time, that there is an error in there.

MR. BENJAMIN:

Marshall K. Higginbotham was born on February 15, 1925.

Mrs. Francis Nell Higginbotham was born in September of 1930.

Mrs. Francis Nell Higginbotham has been married twice, first to George S. Bradley, Jr., said marriage having been terminated by divorce, Gregg County, Longview, Texas, and secondly to Marshall K. Higginbotham.

Marshall K. Higginbotham and Francis Nell Higginbotham were lawfully married on July 24, 1950 and were living together at the time of Mr. Higginbotham's death. No children were born of this marriage, but one child was adopted, namely, Donna Joyce Higginbotham, born April 9, 1957, and adopted September 21, 1962 in No. 19,627 in the 75th Judicial District Court for Liberty County, Texas.

At the time of his death, Marshall K. Higginbotham was a

senior toolpusher for Baxter Drilling Company, earning $1,100.00 per month.

At all times pertinent hereto, decedent, James L. Shinn, was a member of the crew of a vessel. Consequently, plaintiff's claims against Mobil Oil Corporation are covered by the Jones Act and Death on the High Seas Act and General Maritime Law of the United States, as they may apply.

Subsequent to the accident, Mobil Oil Corporation began paying, continued to pay and is now paying benefits under the Longshoremen's and Harbor Workers' Compensation Act directly to the widows of the deceased employees.

The widow of James E. Nation is receiving payments in the amount of $73.50 for each two week period.

The widow of Joseph C. Long, Jr., and James L. Shinn are each receiving payments in the amount of $136.50 for each two week period.

Mobil Oil Corporation is therefore subrogated to the rights of the plaintiffs to the extent of these payments plus interest.

* * * *

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
OPELOUSAS DIVISION

IN ADMIRALTY

THE LIBEL OF
MRS. FRANCIS NELL HIGGINBOTHAM,
AS DULY QUALIFIED ADMINISTRATRIX
AND PERSONAL REPRESENTATIVE OF
MARSHALL K. HIGGINBOTHAM, DECEASED,
FOR THE USE AND BENEFIT OF LIBELANT
AND HER MINOR CHILD, DONNA JOYCE
HIGGINBOTHAM AND INDIVIDUALLY, AND
AS TUTRIX OF SAID MINOR CHILD

AGAINST NO. 13,954

MOBIL OIL CORPORATION AND BELL
HELICOPTER COMPANY A SUBDIVISION
OF OR A SUBSIDIARY OF BELL AEROSPACE
CORPORATION AND/OR TEXTRON, INC.,
IN A CAUSE OF TORT OR DAMAGE, CIVIL
AND MARITIME

CASE NO. 13,954
LIBEL

TO THE HONORABLE, THE UNITED STATES DISTRICT COURT IN AND FOR THE WESTERN DISTRICT OF LOUISIANA

1.

Libelant, Francis Nell Higginbotham, domiciled in Vermilion Parish, Louisiana, has been married twice, first to George S. Bradley, Jr., said marriage being terminated by divorce, Gregg County, Longview, Texas, and secondly to Marshall K. Higginbotham on July 24, 1950, said Marshall K. Higginbotham, being deceased; no children were born to this second marriage but one child was adopted, namely, Donna Joyce Higginbotham, born April 9, 1957, and adopted September 21, 1962, in No. 19,627 in the 75th Judicial District Court for Liberty County, Texas. Marshall K. Higginbotham, departed this life on August 15, 1967, and libelant appearing herein as administratrix of his estate as appears by certificate copy of letters of administration issued in the Succession of Marshall K. Higginbotham,No. 5751, Fifteenth Judicial District Court, Parish of Vermilion, State of Louisiana, annexed hereto and made a part hereof and as personal representative of deceased and his estate and as tutrix of the minor child as shown herein:

2.

Mobil Oil Corporation is a New York corporation domiciled in the State of New York, with its principal office at New York, New York.

3.

Upon information and belief, Bell Helicopter Company a subdivision of or a subsidiary of Bell Aerospace Corporation, a Delaware Corporation and/or Textron, Inc., is a Rhode Island Corporation with its principal office in Providence, Rhode Island, are amenable to suit in Louisiana by virtue of L.S.A.-R.S. 13:3201, etc.

FIRST CAUSE OF ACTION

4.

Respondents, Mobil Oil Corporation and Bell Helicopter Company a subdivision of or a subsidiary of Bell Aerospace Corporation and/or Textron, Inc. are jointly, severally and in solido liable unto Libelant as administratrix and personal representative of Marshall K. Higginbotham, deceased for the use and benefit of Libelant and her minor child, Donna Joyce Higginbotham, under Title 46, U.S.C.A. 761 et seq. the death on the High Seas Act, in the amounts hereinafter set forth, for this, to-wit:

5.

Upon information and belief, at all times material herein, Mobil Oil Corporation was the owner and operator of a Bell Helicopter Model 206-A registration No. 7846S believed to be commonly known as the Jet Ranger.

6.

Upon information and belief, Libelant alleges that Bell

Helicopter Company a subdivision of or a subsidiary of Bell Aerospace Corporation and/or Textron, Inc. is and has been at all times material herein engaged in the business enterprise of designing, manufacturing, altering, testing and inspecting and repairing, and assembling and selling helicopters including the Jet Ranger mentioned in the prior article and parts thereof and suggesting and/or causing modifications therein but the precise nature of these things are unknown to Libellant at this time, but lie peculiarly in the knowledge of the said company.

7.

At all times material herein, on information and belief, Bell Helicopter, in the course and scope of its business, designed, manufactured and sold to Mobil Oil Corporation a Bell Helicopter, believed to be known as the Jet Ranger, Model 206-A registration No. 7846S for use, and same was used by Mobil Oil Corporation for transportation of people and things in and about the Gulf of Mexico, for oil and gas exploration and/or production.

8.

Upon information and belief, Libelant further avers that the manufacturer, Bell Helicopter Company, a subdivision of or a subsidiary of Bell Aerospace Corporation and/or Textron, Inc. agreed and warranted that Bell Helicopter, Model 206-A registration No. 7846S would meet all other pertinent government agencies and warranted that the said helicopter would be free from defects in design and other defects from the manufacturer thereof.

9.

Upon information and belief, the manufacturer further agreed that they would correct or repair such defects, including defects in design that were discovered or became apparent.

10.

Upon information and belief, respondent Mobil Oil Corporation also warranted, impliedly or otherwise, that said helicopter was free from defects in design, structure, and maintenance, and further warranted the flying skill of its pilot, Joseph C. Long, Jr., and that both were safe for its passengers.

11.

On or about August 15, 1967, Bell Helicopter No. 7846S departed from Mobil Oil Corporation's platform A, located in Vermilion Block 216 on the outer continental shelf, Gulf of Mexico, approximately 100 nautical miles South-southwest of Morgan City, Louisiana. The helicopter was operated by Joseph C. Long, Jr., then acting in the course and scope of his employment as a pilot for Mobil Oil Corporation, and carried as passengers, J. L. Shinn, Eddie Nations and Marshall K. Higginbotham.

12.

On information and belief, said helicopter departed on said flight at about 3:40 P.M., on an approximate northeast heading, at an altitude of about 250 to 300 feet above

the water, flying in a normal manner, and was observed to continue flying normally for a distance of about one mile; however, shortly thereafter said helicopter crashed into the Gulf of Mexico approximaterly two and one-half to four miles northeast of Vermilion Block 215, causing instant death of said Joseph C. Long, Jr., J. L. Shinn, Eddie Nations and Marshall K. Higginbotham.

13.

On information and belief, at the time of said crash, the weather was clear with visibility unlimited; the wind was from the southeast at ten to eighteen knots, and the temperature was 86° .

14.

On information and belief, Libelant shows that decedent, Marshall K. Higginbotham, was a passenger in said Bell Helicopter at the time of his death; that said helicopter was manufactured by Bell Helicopter Company a subdivision of or a subsidiary of Bell Aerospace Corporation and/or Textron, Inc., but was owned and operated and in the control of Mobil Oil Corporation; that respondents had full and exclusive custody, control and management of said helicopter; that the decedent Marshall K. Higginbotham relied upon respondents to properly design, manufacture and maintain said helicopter to provide safe transportation that decedent Marshall K. Higginbotham had no knowledge of or control whatsoever over the design, manufacture and maintenance and flying of said helicopter; that the crash that resulted in decedent's death was such that in the usual course of things it would not have occurred had the respondents exercised

proper care; that the respondents possess superior, if not exclusive, access to information concerning the precise cause or causes of the accident; and that Libelant, is entitled to rely upon the negligence of respondents as inferred from the general information herein alleged and therefore invokes the doctrine of res ipsa loquitur as applicable herein.

15.

In the alternative, and only in the alternative should it be held that the doctrine of res ipsa loquitur has no application herein, then, and in that event Libelant avers on information and belief that the crash of said helicopter and resulting death of decedent, Marshall K. Higginbotham, was due to the gross negligence of want of care on the part of respondents, Mobil Oil Corporation and Bell Helicopter Company in the design, manufacture and maintenance of said helicopter, and the lack of care of its pilot, which negligence is joint and concurrent between the respondents, and which proximately caused said crash and resulting death, as herein set forth.

16.

On information and belief, Libelant alleges that during said flight some part or parts of the structure of the helicopter failed, initiating a change of subsequent structural failures, rendering said helicopter incapable of flight and causing it to crash.

17.

Libelant avers upon information and belief that the gross

negligence and want of care on the part of respondents consisted particularly, but not exclusively, of the following acts of commission and omission, together with negligence in other respects, as will be shown upon the trial:

a. The aeronautical design by respondent, Bell Helicopter Company, of the Helicopter 206-A failed to provide for sufficient strength and durability to withstand the normal stress of helicopter flight.

b. Respondent, Bell Helicopter failed to use materials and methods in the construction of said helicopter 7846S adequate to provide sufficient strength and durability to withstand the normal stress of helicopter flight.

c. Respondent, Bell Helicopter Company, failed to manufacture said helicopter in a careful and prudent manner so as to prevent weakness in the structure thereof sufficient to withstand the normal stress of helicopter flight.

d. Respondent, Bell Helicopter Company, failed to adequately inspect and test said helicopter 7846S to determine that said helicopter was incapable of withstanding the normal stress of helicopter flight.

e. Respondent, Bell Helicopter Company, failed to do what it should have done and to see what it should have seen under these circumstances.

f. Failure to provide foreseeable users of the aircraft with airworthy craft.

g. Failure to warn in sufficient terms of recurrent failure

of the tail section of this particular model of helicopter.

i. (sic) Failure to properly see to it that modifications in the tail boom assembly were made and made properly, all of which would have prevented the in-flight failure, and/or structural failure of this particular helicopter.

18.

Libellant further avers upon information and belief that the gross negligence and want of care on the part of the respondent Mobil Oil Corporation consisted particularly, but not exclusively, of the following acts of commission and omission, together with negligence in other respects, as will be shown upon the trial:

a. Failure to inspect the design of helicopter 206-A to insure sufficient strength and durability to withstand the normal stress of helicopter flight.

b. Failed to adequately inspect the materials and methods in construction of said helicopter 7846S adequate to provide sufficient strength and durability to withstand the normal stress of helicopter flight.

c. Failed to inspect and maintain said helicopter in careful and prudent manner so as to detect and prevent weakness in the structure thereof sufficient to withstand the normal stress of helicopter flight.

d. Failed to adequately inspect and test said helicopter 7846S to determine the said helicopter was incapable of withstanding the normal stress of helicopter flight.

e. Failed to adequately select and train the pilot for flight and for emergencies.

f. Failed to do what it should have done and to see what it should have seen under the circumstances.

g. Failure to follow properly modifications and necessary proper procedures.

h. Failure to provide an airworthy craft and crew, including pilot.

i. Failure to make other necessary alterations in this particular helicopter, all of which would have prevented structural failure of said aircraft.

j. Failure to inspect said craft to prevent failure such as the one that occurred.

Libelant reserves the right to amend and supplement this article of the libel.

19.

Libelant further avers on information and belief that respondent expressly or impliedly warranted that said helicopter 7846S was safe, sound, airworthy and fit for normal passenger flight, which warranties were breached by the failures and defects in design and manufacture and maintenance of said helicopter and of its handling in flight as herein set out without particularity, which breaches of warranty proximately caused the crash of said helicopter 7846S and resulting death of decedent.

20.

Decedent, Marshall K. Higginbotham was born on February 15, 1925, and had a life expectancy of at least thirty years at the time of his death; decedent was employed as a senior tool pusher for Baxter Drilling, Inc. at a salary of ONE THOUSAND ONE HUNDRED DOLLARS ($1,100.00) per month; that decedent was in excellent health and had a high expectancy of substantial and steady increases in earnings during his life time, and particularly in following his career with Baxter Drilling, Inc.

21.

Decedent, Marshall K. Higginbotham, was a dutiful and devoted husband and father and by his untimely death, Libelant and the minor child, Donna Joyce Higginbotham, have been deprived of the love, care, attention and companionship which would have been theirs for many years; that said child has lost the value of the intellectual,moral, and physical training and education which only a father can supply; that decedent contributed sum total of all his earnings to the support of his family, and that as a result of the death of decedent, Libelant and said Minor child have been deprived of his support forever.

22.

As a result of the death of decedent, Marshall K. Higginbotham, caused as hereinabove set forth, Libelant, as surviving widow of the decedent, and Libelant's said minor child, Donna Joyce Higginbotham, have suffered damages in the following itemized amounts:

a. For the damages due Mrs. Francis Nell Higginbotham for the loss of support which she would have received had her husband lived $397,000.00

b. For damages due Mrs. Francis Nell Higginbotham for the loss of inheritance or her interest in residual community property 40,000.00

c. For damages due Donna Joyce Higginbotham for the loss of support which she would have received had her father lived $ 40,000.00

d. For damages due Donna Joyce Higginbotham for the loss of the intellectual, moral and physical training and education which she would have received had her father lived. 25,000.00

TOTAL $502,000.00

23.

For the foregoing reason, respondents are liable unto Libelant, as administratrix and personal representative of Marshall K. Higginbotham, deceased, for the use and benefit of Libelant and her said minor child, Donna Joyce Higginbotham, in the full and true sum of Five Hundred Two Thousand and No/100 ($502,000.00) together with legal interest from judicial demand and all costs.

24.

Libelant avers that the premises are true and within the Admiralty and Maritime jurisdiction of the United States

and of this Honorable Court.

25.

In the alternative, and only in the event the Court finds that the negligence of the respondents were not joint and concurrent then and in that event libelant avers that the said helicopter crash and resulting death of decedent, Marshall K. Higginbotham, was proximately caused by the separate and individual acts of negligence on the part of each respective respondent, as hereinabove set forth with particularity, and that each respondent is severally liable to libelant for the damages set forth.

SECOND CAUSE OF ACTION

In the alternative, and only if the Court should find that Libelant is not entitled to bring this proceeding under the provisions of 46 U.S.C.A. 761 et seq., then, and in that event, Libelant avers that respondents are fully and truly indebted unto Libelant individually and as Tutrix of her minor child, Donna Joyce Higginbotham, for their use and benefit, under the laws of the State of Louisiana, including but not limited to Article 2315 of Louisiana's Civil Code, as hereinafter set out, and Libelant respectfully requests this Honorable Court to transfer this action to the Civil side of the Court.

27.

Libelant, individually and as Tutrix of her minor child, Donna Joyce Higginbotham, for the use and benefit, repeats and realleges all of the allegations hereinabove set forth in

this libel in Article 4 through 25 the same as if the said allegations were copied herein in extenso.

28.

Libelant avers that the amount in controversy herein exceeds exclusive of interest and costs, the sum of TEN THOUSAND DOLLARS AND NO/100 ($10,000.00) and there is diversity of citizenship between libelant and respondents.

29.

As a result of the death of decedent, Marshall K. Higginbotham, caused as herein set forth, Libelant, as surviving widow of the decedent, and Libelant's minor child, Donna Joyce Higginbotham, have suffered damages in the following amounts:

a. For the damages due Mrs. Francis Nell Higginbotham for the wrongful death of her husband, Marshall K. Higginbotham, including the loss of his love, attention, devotion, care, affection and companionship $ 60,000.00

b. For the damages due Mrs. Francis Nell Higginbotham for the loss of support which she would have received had her husband lived 397,000.00

c. For the damages due Donna Joyce Higginbotham for the wrongful death of her father, including the loss of his fatherly love, attention, devotion, care, affection and companionship $ 50,000.00

d. For the damages due Donna Joyce Higginbotham for the loss of support which she would have received had her father lived 40,000.00

TOTAL $547,000.00

30.

For the foregoing reason, respondents are liable unto Libelant, individually and as Tutrix of her minor child, Donna Joyce Higginbotham, in the full and true sum of FOUR HUNDRED FIFTY SEVEN THOUSAND DOLLARS AND NO/100 ($457,000.00) together with legal interest from judicial demand until paid and all costs of this Court.

31.

In the further alternative, and only if the Court should find that Libelant is not entitled to bring this proceeding under the provisions of 46 U.S.C.A. 761 et seq., and if the Court should further find that Libelant is not entitled to have this action transferred to the Civil side of the Court, then, and in that event, Libelant avers that the laws of the State of Louisiana are applicable herein, and that libelant is entitled to recover the amounts in the manner and for the reasons herein set forth as a Second Cause of Action, all within the Admiralty and Maritime jurisdiction of the United States and this Honorable Court.

32.

Libelant desires and is entitled to a trial by jury on the

Second Cause of Action, hereinabove set forth.

WHEREFORE, LIBELANT PRAYS:

1. That citation in due form of law may issue against the respondents, Bell Helicopter Company a subdivision of or a subsidiary of Bell Aerospace Corporation and/or Textron, Inc., citing it to appear and answer in the premises.

2. That citation in due form of law may issue against the respondents, Mobil Oil Corporation, citing it to appear and answer in the premises.

3. That after due proceedings had, the Court adjudge and decree that respondent, Bell Helicopter Company a subdivision of or a subsidiary of Bell Aerospace Corporation and/or Textron, Inc., and Mobil Oil Corporation, jointly and in solido, paid to Libelant, Mrs. Francis Nell Higginbotham, as administratrix and personal representative of the decedent, Marshall K. Higginbotham, the sum of FIVE HUNDRED TWO THOUSAND DOLLARS AND NO/100 ($502,000.00), as damages, together with interest from August 15, 1967, until paid, and all costs.

4. In the alternative, and in the event that this Court should find that the provisions of 46 U.S.C.A. 761 et seq. are not applicable herein, then in that event the Court adjudge and decree that respondent, Bell Helicopter Company, a subdivision of or a subsidiary of Bell Aerospace Corporation and/or Textron, Inc. and Mobil Oil Company, jointly and in solido, paid to Libelant, Mrs. Francis Nell Higginbotham, individually, the sum of FIVE HUNDRED FORTY SEVEN THOUSAND DOLLARS AND NO/100

($547,000.00) as damages and to Libelant as tutrix of her minor child, Donna Joyce Higginbotham, for their use and benefit, the sum of NINETY THOUSAND DOLLARS AND NO/100 ($90,000.00) together with legal interest thereon from date of judicial demand until paid, and all costs.

4. That trial by jury be granted as to the SECOND CAUSE OF ACTION hereinabove set forth.

5. That this Honorable Court grant to Libelant such other and further relief as the justice of the cause may require.

6. That two certified copies of this libel and citations to defendants Bell Helicopter Company a subdivision of or a subsidiary of and/or Bell Aerospace Corporation be prepared by the Clerk of this Court and delivered to counsel for petitioners for service on said defendants in accordance with the provisions of Section 3204 of Title 13 of the Louisiana's Revised Statutes of 1950.

THOMPSON & SELLERS

By /s/ Charles M. Thompson, Jr.
Charles M. Thompson, Jr.
Attorney for Petitioner
P. O. Box 308
Abbeville, Louisiana

STATE OF LOUISIANA
PARISH OF VERMILION

MRS. FRANCIS NELL HIGGINBOTHAM, being duly sworn, says that she is the administratrix and personal representative of the decedent, Marshall K. Higginbotham; that she is the Tutrix of her minor child, Donna Joyce Higginbotham; that she is the Libelant above named; that she has read the foregoing libel and knows the contents thereof; and that the same is true of her own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters, she believes them to be true.

/s/ Mrs. Francis Nell Higginbotham

Sworn to and subscribed before me this 22nd day of July, 1968.

Charles M. Thompson, Jr.
Notary Public

ANSWER OF MOBIL OIL CORPORATION

NO. 13,954

(Title Omitted)

TO THE HONORABLE, THE UNITED STATES DISTRICT COURT IN AND FOR THE WESTERN DISTRICT OF LOUISIANA:

Respondent, Mobil Oil Corporation, files this Answer in response to the Complaint of Libelant, Francis Nell Higginbotham, Administratrix of the Estate of Marshall K. Higginbotham.

1.

Respondent denies information or knowledge sufficient to form a belief as to the truth or falsity of Article 1 of such Libel.

2.

Respondent admits the allegations of Article 2 of such Libel.

3.

Respondent admits the allegations of Article 3 of such Libel.

4.

Respondent denies the allegations of Article 4 of such

Libel.

5.

Respondent admits that it was, on August 15, 1967, the owner and operator of a Bell Helicopter, Model 206-A, Registration No. 7846S, commonly known as the Jet Ranger, but specifically denies that it was the owner and operator of such aircraft at all times material herein.

6.

Respondent admits the allegations of Article 6 of the Libel.

7.

Respondent admits that in the course and scope of its business, Bell Helicopter designed, manufactured and sold to Mobil Oil Corporation a Bell helicopter known as Jet Ranger, Model 206-A, Registration No. 7846S, for use, and same was used by Mobil Oil Corporation for transportation of people and things in and about the Gulf of Mexico for oil and gas exploration and/or production. Respondent, however, specifically denies that such sale and use was made at or during all times material herein.

8.

Respondent admits to the allegations of Article 8 of the Libel.

9.

Respondent denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Article 9.

10.

Respondent Mobil Oil Corporation denies the allegations of Article 10 of the Libel.

11.

Respondent admits the allegations of Article 11 of the Libel.

12.

Respondent admits to the allegations of Article 12 of the Libel.

13.

Respondent admits to the allegations of Article 13 of the Libel.

14.

Respondent Mobil Oil Corporation admits that Marshall K. Higginbotham was a passenger in said Bell helicopter at the time of his death; that said helicopter was manufactured by Bell Helicopter Company, a subdivision of or a subsidiary of Bell Aerospace Corporation and/or Textron,Inc.; and

that such helicopter was, at the time of Marshall K. Higginbotham's death, owned and operated by Mobil Oil Corporation. Respondent Mobil Oil Corporation denies, however, that it had full and exclusive custody, control and management of said helicopter;and further specifically denies all other allegations in Article 14 of the Libel not herein specifically admitted.

15.

Respondent Mobil Oil Corporation denies the allegations of Article 15 insofar as same relates to Mobil Oil Corporation.

16.

At this time Respondent Mobil Oil Corporation denies information or knowledge sufficient to form a belief as to the truth or falsity of the allegations of Article 16.

17.

Insofar as Article 17 relates to Respondent Mobil Oil Corporation, if it does, Mobil Oil Corporation specifically denies that it was negligent in any manner alleged in Article 17.

18.

Respondent Mobil Oil Corporation denies the allegations of Article 18 and each subparagraph therein.

19.

Respondent Mobil Oil Corporation admits to the allegations of Article 19 of the Libel.

20.

At this time Respondent Mobil Oil Corporation denies information or knowledge sufficient to form a belief as to the truth or falsity of the allegations of Article 20.

21.

At this time Respondent Mobil Oil Corporation denies information or knowledge sufficient to form a belief as to the truth or falsity of the allegations of Article 21.

22.

At this time Respondent Mobil Oil Corporation denies information or knowledge sufficient to form a belief as to the truth or falsity of the allegations of Article 22.

23.

Respondent Mobil Oil Corporation denies the allegations of Article 23 of the Libel.

24.

Respondent Mobil Oil Corporation denies the allegations of Article 24 of the Libel.

25.

Respondent Mobil Oil Corporation denies the allegations of Article 25 of the Libel.

26.

Respondent Mobil Oil Corporation denies the allegations of Article 26 of the Libel.

27.

Respondent Mobil Oil Corporation, in response to Article 27 of the Libel, repeats and re-alleges all of the allegations hereinabove set forth in Articles 4 through 25 of this response, the same as if such allegations were copied herein in full.

28.

Respondent Mobil Oil Corporation denies information or knowledge sufficient to form a belief as to the truth or falsity of the allegations of Article 28.

29.

Respondent Mobil Oil Corporation denies the allegations of Article 29 of the Libel.

30.

Respondent Mobil Oil Corporation denies the allegations of Article 30 of the Libel.

31.

Respondent Mobil Oil Corporation denies the allegations of Article 31 of the Libel.

32.

Respondent Mobil Oil Corporation denies the allegations of Article 32 of the Libel.

WHEREFORE, Respondent prays that the libel herein be dismissed with all costs taxed to libelant.

W. H. TABB
RONALD L. NEILL
2311-H Mobil Building
P.O. Box 900
Dallas, Texas 75221
(214) 742-4131

LEMLE, KELLEHER,
KOHLMEYER, MATTHEWS,
& SCHUMACHER
1800 National Bank of Commerce
Building
New Orleans, Louisiana 70112

By George B. Matthews GF

By (Illegible)
Attorneys for Respondent Mobil
Oil Corporation

FIRST SUPPLEMENTAL AND AMENDED COMPLAINT

NO. 13,954

(Title Omitted)

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT IN AND FOR THE WESTERN DISTRICT OF LOUISIANA, OPELOUSAS DIVISION

Now into Court through undersigned counsel, comes Francis Nell Higginbotham, as duly qualified administratrix and personal representative of Marshall K. Higginbotham, deceased, for the use and benefit of libelant and her minor child, Donna Joyce Higginbotham and individually, and as tutrix of said minor child, and with all due respect represents that:

1.

Complaint amends Paragraph 22 of the original complaint to read as follows:

22.

As a result of the death of decedent, Marshall K. Higginbotham, caused as hereinabove set forth, Libellant, as surviving widow of the decedent, and Libelant's said minor child, Donna Joyce Higginbotham, have suffered damages in the following itemized amounts:

a. For the damages due Mrs. Francis Nell Higginbotham for the loss of support which she would

have received had her husband lived $397,000.00

b. For damages due Mrs. Francis Nell Higginbotham for the loss of inheritance or her interest in residual community property 40,000.00

c. For damages due Donna Joyce Higginbotham for the loss of support which she would have received had her father lived 240,000.00

d. For damages due Donna Joyce Higginbotham for the loss of the intellectual, moral and physical training and education which she would have received had her father lived 225,000.00

TOTAL $902,000.00

II.

Complainant amends Paragraph 23 of the original complaint to read as follows:

23.

For the foregoing reason, respondents are liable unto Libelant, as administratrix and personal representative of Marshall K. Higginbotham, deceased, for the use and benefit of Libelant and her said minor child, Donna Joyce Higginbotham in the full and true sum of NINE HUNDRED TWO THOUSAND AND NO/100 (902,000.00) together with legal interest from judicial demand and all costs.

III.

Complainant further amends Paragraph 29 of the original complaint to read as follows:

29.

As a result of the death of decedent, Marshall K. Higginbotham, caused as herein set forth, Libelant, as surviving widow of the decedent, and Libelant's minor child, Donna Joyce Higginbotham, have suffered damages in the following itemized amounts:

a. For the damages due Mrs. Francis Nell Higginbotham for the wrongful death of her husband, Marshall K. Higginbotham, including the loss of his love, attention, devotion, care, affection and companionship $ 60,000.00

b. For the damages due Mrs. Francis Nell Higginbotham for the loss of support which she would have received had her husband lived 397,000.00

c. For the damages due Donna Joyce Higginbotham for the wrongful death of her father, including the loss of his fatherly love, attention, devotion, care, affection and companionship 50,000.00

d. For the damages due Donna Joyce Higginbotham for the loss of support which she would have received had her father lived 240,000.00

TOTAL $747,000.00

IV.

Complainant further amends Paragraph 30 of the original complaint to read as follows:

30.

For the foregoing reason, respondents are liable unto Libelant, individually and as Tutrix of her minor child, Donna Joyce Higginbotham, in the full and true sum of SEVEN HUNDRED FORTY-SEVEN THOUSAND AND NO/100 ($747,000) together with legal interest from judicial demand until paid and all costs of this court.

WHEREFORE, LIBELANT PRAYS:

1. That citation in due form of law may issue against the respondents, Bell Helicopter Company a subdivision of or a subsidiary of Bell Aerospace Corporation and/or Textron, Inc., citing it to appear and answer in the premises.

2. That citation in due form of law may issue against the respondents, Mobil Oil Corporation, citing it to appear and answer in the premises.

3. That after due proceedings had, the Court adjudge and decree that respondent, Bell Helicopter Company a subdivision of or a subsidiary of Bell Aerospace Corporation and/or Textron, Inc., and Mobil Oil Corporation, jointly and in solido, paid to Libelant, Mrs. Francis Nell Higginbotham, as administratrix and personal representative of the decedent, Marshall K. Higginbotham, the sum of NINE HUNDRED TWO THOUSAND AND NO/100 ($902,000)

as damages, together with interest from August 15, 1967, until paid, and all costs.

4. In the alternative, and in the event that this Court should find that the provisions of 46 U.S.C.A. 761 et seq. are not applicable herein, then in that event the Court adjudge and decree that respondent, Bell Helicopter Company a subdivision of or a subsidiary of Bell Aerospace Corporation and/or Textron, Inc. and Mobil Oil Corporation, jointly and in solido, paid to Libelant, Mrs. Francis Nell Higginbotham, individually, the sum of FOUR HUNDRED FIFTY-SEVEN DOLLARS AND NO/100 (sic) ($457,000.00) as damages and to Libelant as Tutrix of her minor child, Donna Joyce Higginbotham, for their use and benefit, the sum of TWO HUNDRED NINETY THOUSAND AND NO/100 ($290,000.00) together with legal interest thereon from date of judicial demand until paid, and all costs.

5. That trial by jury be granted as to the SECOND CAUSE OF ACTION hereinabove set forth.

6. That this Honorable Court grant to Libelant such other and further relief as the justice of the cause may require.

7. That two certified copies of this libel and citations to defendants Bell Helicopter Company a subdivision of or a subsidiary of and or Bell Aerospace Corporation be prepared by the Clerk of this Court and delivered to counsel for petitioners for service on said defendant in accordance with the provisions of Section 3204 of Title 13 of the Louisiana's Revised Statutes of 1950.

THOMPSON & SELLERS

By Charles M. Thompson, Jr.
Attorneys for Petitioner

Filed
Feb. 25, 1971

ANSWER TO FIRST SUPPLEMENTAL AND AMENDED COMPLAINT

NO. 13, 954

(Title Omitted)

The answer of Mobil Oil Corporation to complainant's First Supplemental and Amended Complaint respectively represents that:

I.

The original Answer and Cross-Claim and the Supplemental and Amending Answer and Cross-Claim of Mobil Oil Corporation are referred to and made part hereof by reference as though copied in extenso herein.

II.

The allegations of Paragraph I of the First Supplemental and Amended Complaint are denied.

III.

The allegations of Paragraph II of the First Supplemental and Amended Complaint are denied.

IV.

The allegations of Paragraph III of the First Supplemental and Amended Complaint are denied.

V.

The allegations of Paragraph IV of the First Supplemental and Amended Complaint are denied.

WHEREFORE, defendant, Mobil Oil Corporation, prays that the libel herein be dismissed with all costs taxed to libelant; and for all just and equitable relief.

/s/ Carl J. Schumacher, Jr.
/s/ Robert E. Badger

LEMLE, KELLEHER,
KOHLMEYER,
MATTHEWS & SCHUMACHER

Ronald L. Neill
P.O. Box 900
Dallas, Texas
Attorneys for Mobil Oil Corporation

Filed
Jan. 28, 1971

COMPLAINT OF JEANETTE LE BLANC NATION

NO. 15,316

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

JEANETTE LE BLANC NATION,
As personal representative for
ELLA MENARD NATION and ROY GLEN NATION,
Plaintiffs

CIVIL ACTION
NO 68-1344

VERSUS

SECTION C

TEXTRON INDUSTRIES, INC., d/b/a
BELL HELICOPTER COMPANY
or BELL HELICOPTER COMPANY
and MOBIL OIL CORPORATION
Defendants

NO. 15,316

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT IN AND FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

Now into Court through undersigned counsel, comes JEANETTE LE BLANC NATION, as personal representative of the decedent, JAMES E. NATION, for the exclusive benefit of his surviving spouse, ELLA MENARD NATION and his son, ROY GLEN NATION, all persons of the full age of majority, and with all due respect, does represent as follows:

1.

This Honorable Court has jurisdiction by virtue of the fact that the personal representative for the persons in this action is a citizen of the State of North Carolina and that neither defendants, TEXTRON INDUSTRIES, INC. d/b/a BELL HELICOPTER COMPANY or BELL HELICOPTER COMPANY and MOBIL OIL CORPORATION, for the purposes of this accident, are citizens of the State of North Carolina but rather TEXTRON INDUSTRIES, INC., d/b/a BELL HELICOPTER COMPANY or BELL HELICOPTER COMPANY are citizens of the State of Texas and MOBIL OIL CORPORATION is a citizen of the State of Louisiana and of the State of Delaware.

II.

On August 15, 1967, decedent, JAMES E. NATION, was killed as a result of the joint negligence of both defendants herein, namely, TEXTRON INDUSTRIES, INC., d/b/a BELL HELICOPTER COMPANY or BELL HELICOPTER COMPANY and MOBIL OIL CORPORATION, when he was a passenger in a Bell "Jet Ranger" Helicopter, Model 206-A, bearing FAA identification No. N-7846S, crashed into the Gulf of Mexico more than one marine league from shore.

III.

TEXTRON INDUSTRIES, INC., d/b/a BELL HELICOPTER COMPANY or BELL HELICOPTER COMPANY, shall hereinafter be referred to as Textron-Bell and MOBIL OIL CORPORATION shall hereinafter be referred to as Mobil.

IV.

The negligence of Textron-Bell consisted of more particularly but not exclusively of the following:

(a) Failure to provide foreseeable users of an aircraft with an airworthy craft;

(b) Failure to warn in sufficient terms of the recurrent failure of the tail section of this particular model; and

(c) Failure to properly see to it that modifications in the tail boom assembly were made and made properly, all of which would have prevented the in-flight failure, structural failure of this particular helicopter.

The negligence of Mobil consisted more particularly of the failure to follow the proper modifications and proper procedure, and to provide an airworthy craft and crew, and to make other alterations in this particular craft, all of which would have prevented structural failure of said craft, and the failure to inspect said craft to prevent failure such as the one that occurred.

V.

Both plaintiffs are entitled to proceed under 2315 Louisiana Code of Civil Procedure and are further entitled to proceed in this cause of action on The Death On The High Seas Act.

VI.

As a result of the death of decedent, JAMES E. NATION,

his surviving spouse, ELLA MENARD NATION, has been damaged to the extent of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS; As a result of the death of James E. Nation, his surviving son and heir, Roy Glen Nation, has been damaged to the extent of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

WHEREFORE, the personal representative for Ella Menard Nation and Roy Glen Nation prays as follows:

1. That all defendants be served with a copy of this petition, together with citation, ordering them to appear and answer same;

2. That after due proceeding had let there be judgment herein against both defendants, jointly and in solido, in the full sum of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS in favor of Ella Menard Nation and TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS in favor of Roy Glen Nation.

By: s/ George J. Garzotto
GEORGE J. GARZOTTO,T.A.
Attorney for plaintiff
1040 Maison Blanche Bldg.
New Orleans, Louisiana 70112
525-5292

Filed

July 12, 1968
Eastern Dist. of La.

Filed

Jan. 7, 1970
—— Western Dist. of La.

ANSWER AND CROSS CLAIM OF MOBIL OIL CORPORATION

NO. 15, 316

(Title Omitted)

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT IN AND FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS, LOUISIANA

Defendant, Mobil Oil Corporation, (hereinafter called "Mobil"), for its answer to Plaintiff's Complaint, respectfully presents the following:

First Defense

The Complaint fails to state a claim against Defendant Mobil Oil Corporation, upon which relief may be granted.

Second Defense

Defendant, Mobil, is without sufficient knowledge or information to form a belief as to the truth of the allegation that Plaintiff, Jeanette Le Blanc Nation is a citizen of the State of North Carolina. Defendant denies the remaining allegations of Paragraph I of the Complaint.

Third Defense

Defendant admits that James E. Nation was killed when a Bell "Jet Ranger" helicopter, Model 206-A, bearing FAA

Identification No. N-7846S, in which he was a passenger, crashed into the Gulf of Mexico more than one marine league from shore. Defendant specifically denies the remainder of Paragraph II. Defendant Mobil admits the allegations of Paragraph III of the Complaint.

Fourth Defense

Defendant denies Paragraph IV of the Complaint. For further answer, Defendant, Mobil, alleges that if the accident which is the basis of this Complaint, was the result of negligence, such negligence was that of Bell Helicopter Company, a Division of Bell Aerospace Corporation, in the design, manufacture, and sale of the aircraft to Mobil.

Fifth Defense

Defendant denies the allegations in Paragraph V of the Complaint. In this regard, Defendant alleges that Plaintiff has heretofore received and accepted benefits which accrued and which were tendered to Plaintiff under the "Longshoremen's and Harbor Workers' Compensation Act", 33 U.S.C. 901, et seq., which is the exclusive remedy available to Plaintiff for damages arising out of the accident in question.

Sixth Defense

Defendant denies the allegations contained in Paragraph VI of the Complaint.

WHEREFORE, Defendant, Mobil Oil Corporation, prays that the Complaint of Plaintiff, Jeanette LeBlanc Nation, as personal representative for Ella Menard Nation and Roy

Glen Nation, be dismissed as to Defendant Mobil Oil Corporation, and that it recover its costs and all other general relief.

CROSS-CLAIM

Defendant, Mobil Oil Corporation, acting as Plaintiff herein, files this cross-claim against Bell Helicopter Company, a Division of Bell Aerospace Corporation, (hereinafter called "Bell"), and as grounds for its Complaint would respectfully show the following:

1.

This Honorable Court has jurisdiction of this cross-claim by virtue of the facts that there is diversity of citizenship and amount.

2.

Cross-Claimant, Mobil, is a corporation incorporated under the laws of the State of New York, and having its principal place of business in the State of New York. Cross-Defendant, Bell Aerospace Corporation, is a corporation incorporated under the laws of the State of Delaware with its principal place of business in Delaware. Plaintiff is a citizen of the State of North Carolina. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

3.

Cross-Claimant, Mobil, would show that if the accident in

question was the result of negligence, which it denies, such negligence was that of Bell in the design, manufacture, and sale of the helicopter aircraft to Mobil. Further, such negligence was the direct and proximate cause of the accident in question. Accordingly, Mobil is entitled to be indemnified by Bell for all liability herein, if any, which may be adjudged against it.

WHEREFORE, cross-claimant Mobil prays that it have and recover from Bell Helicopter Company, a Division of Bell Aerospace Corporation, any and all liability which may be adjudged herein against Mobil, if any, and for all other general relief.

Respectfully submitted,

W. H. TABB
RONALD L. NEILL
2307 Mobil Building
P.O. Box 900
Dallas, Texas 75221
(214) 742-4131

/s/ Ronald L. Neill

George B. Matthews
George A. Frilot, III
1800 National Bank of Commerce Bldg.
New Orleans, La.

Filed
Jan. 7, 1970

FIRST SUPPLEMENTAL COMPLAINT

NO. 15,316

(Title Omitted)

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT IN AND FOR THE WESTERN DISTRICT OF LOUISIANA, OPELOUSAS DIVISION

Now into Court through undersigned counsel comes Jeanette LeBlanc Nation, as personal representative of the decedent, James E. Nation, for the exclusive benefit of his surviving spouse, Ella Menard Nation and his son, Roy Glen Nation, all persons of the full age of majority and with all due respect represents that:

1.

Complainant amends paragraph IV of the original complaint to read as follows:

IV.

The negligence of Textron-Bell consists particularly, but not exclusively of the following: Failure to design, fabricate, and manufacture an airworthy helicopter, and the failure to select safe design and materials for said craft, failure to provide foreseeable users of an aircraft with an airworthy craft, failure to warn in sufficient terms of the recurrent failure of the tail section of this particular model 206-A, and failure to warn at all of potential problems after having received many complaints from other customers of

cracking in the tail boom, and failure to properly see to it that modifications in tail boom assembly were made and made properly, all of which would have prevented the in-flight failure of structural members of this helicopter, namely the tail boom.

The negligence of Mobil consisted more particularly but not exclusively of the failure to follow the proper modifications and proper procedure, failure to adequately hire and select competent pilots and the failure to provide an airworthy craft and crew, and to make alterations in this particular craft, all of which would have prevented the structural failure of said craft, and the failure to inspect said craft to prevent in-flight failure such as the one that did occur; the manning of said helicopter with a pilot lacking competent disposition and maturity and the failure of Mobil to furnish a safe and sound means and mode of transportation to, from and between job assignments for James E. Nation, a seaman, and its employee.

2.

Complainant further amends Paragraph IV by adding the following paragraphs to read as follows:

IV-A

At all times pertinent hereto, defendant, Mobil Oil Corporation owned, operated, equipped, manned, managed, and controlled many navigable vessels to which decedent James E. Nation was assigned as a member of the crew and who was then and there contributing to the mission and purpose thereof and the last vessel being "Crestwave Topper

#1".

IV-B.

On or about August 15, 1967, while said vessel, "Crestwave Topper #1" was located in navigable waters, Gulf of Mexico, off of the Louisiana coast, decedent, James E. Nation, lost his life while pursuing his assigned work duties as a result of the negligence of defendant, Mobil Oil Corporation, its representatives and/or its employees and also due to the unseaworthiness of said vessel and its personnel and appliances.

IV-C

IV-C

Decedent was killed while being transported from one work location to another in a Bell "Jet Ranger" Helicopter owned by Mobil Oil Corporation.

3.

Complainant amends paragraph V of the original complaint to read as follows:

V.

Both plaintiffs are entitled to proceed under Article 2315 of the Louisiana Civil Code and are further entitled to proceed in this same cause of action under the Death on the High Seas Act, the Jones Act and the General Maritime Law.

WHEREFORE, the personal representative for Ella Men-

ard Nation and Roy Glen Nation pray as follows: That all defendants be served with a copy of this petition, together with citation, ordering them to appear and answer same; that after due proceeding had let there be judgment herein against both defendants, jointly and in solido, in the full sum of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS in favor of Ella Menard Nation and TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS in favor of Roy Glen Nation; together with all costs and disbursements of this action, interest from date of judicial demand, for all general and equitable relief, and for a trial by jury.

THOMPSON & SELLERS

By Charles M. Thompson, Jr.

Filed
Feb. 25, 1971.

ANSWER TO FIRST SUPPLEMENTAL AND AMENDED COMPLAINT

NO. 15,316

(Title omitted)

The answer of Mobil Oil Corporation to complainant's First Supplemental and Amended Complaint respectfully represents that:

I.

The original Answer and Cross-Claim and the Supplemental and Amending Cross-Claim of Mobil Corporation are referred to and made a part hereof by reference as though copied in extenso herein.

II.

The allegations of Paragraph 1 of the First Supplemental and Amended Complaint, insofar as they apply to Textron-Bell, require no answer on the part of Mobil Oil Corporation; the remainder of the allegations of Paragraph 1, insofar as they apply to Mobil Oil Corporation, are denied.

III.

Defendant, Mobil Oil Corporation, admits the allegations of Sub-Paragraph IV-A of Paragraph 2 of the First Supplemental and Amended Complaint insofar as they allege that at all times pertinent herein Mobil owned, operated, equipped, manned, managed and controlled many navigable

vessels; denies the remainder of the allegations in Sub-Paragraph IV-A; specifically denies that Mobil owned, operated, equipped, manned, managed and controlled the vessel CRESTWAVE TOPPER NO. 1, at all times pertinent herein; and specifically denies that decedent, James E. Nation, was at all times pertinent herein a member of the crew of the vessel CRESTWAVE TOPPER NO. 1.

IV.

Defendant, Mobil Oil Corporation, admits the allegations of Sub-Paragraph IV-B of Paragraph 2 of the First Supplemental and Amended Complaint insofar as they allege that decedent, James E. Nation, lost his life while pursuing his assigned work duties on or about August 15, 1967; denies for lack of sufficient information to justify a belief as to the truth of the allegation that at all times pertinent herein the vessel CRESTWAVE TOPPER NO. 1 was located in navigable waters, Gulf of Mexico, off the Louisiana coast; and denies the remainder of the allegations of Sub-Paragraph IV-B of Paragraph 2.

V.

Defendant, Mobil Oil Corporation, admits the allegations of Sub-Paragraph IV-C of Paragraph 2 of the First Supplemental and Amended Complaint insofar as they allege that decedent was killed while being transported in a Bell "Jet Ranger" Helicopter owned by Mobil; but denies the remainder of the allegations of Sub-Paragraph IV-C.

Defendant, Mobil Oil Corporation, denies the allegations of Paragraph 3 of the First Supplemental and Amended

Complaint.

WHEREFORE, defendant, Mobil Oil Corporation, prays that the Complaint and First Supplemental and Amended Complaint of plaintiff, Jeanette LeBlanc Nation, be dismissed as to defendant, Mobil Oil Corporation, with all costs taxed to complainant;and for all just and equitable relief.

/s/ Carl J. Schumacher, Jr.

/s/ Robert E. Badger

Ronald L. Neill

Attorneys for Mobil Oil Corp.

Filed
Jan. 28, 1971

COMPLAINT FOR DAMAGES

NO. 15,326

IN THE DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

MRS. ARLINE J. SHINN, Individually and as Testamentary Executrix of the Succession of J. L. Shinn, Deceased	CIVIL ACTION NO. 68-1508
VERSUS	
MOBIL OIL CORPORATION	SECTION D (Western Dist. of La. No. 15,316)

COMPLAINT FOR DAMAGES

TO THE HONORABLE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION, AND THE JUDGES THEREOF:

The complaint of Mrs. Arline Jones, widow of J. L. Shinn, of lawful age, residing at Apartment 204, La Vista Apartments, San Marcos, Texas, through her undersigned counsel, complaining of the above-named defendant, Mobil Oil Corporation, respectfully alleges and shows unto this Honorable Court that:

1.

Plaintiff is the duly appointed and qualified testamentary executrix of the Succession of J. L. Shinn as per letters testamentary issued to her by the Sixteenth Judicial District Court for the Parish of St. Mary, Louisiana, in proceedings bearing number 8 2 1 3 on the docket by said Court:

2.

Plaintiff is also the surviving widow of J. L. Shinn who was married but once and then to plaintiff on March 5, 1931, in Georgetown, Texas;

3.

Of said marriage six children were born, namely, Robert Phil, Patsy Fay, Eldon Ray, James Lynwood, John Eugene and Linda Arlene Shinn, the latter two of whom are under the age of 21 years, resided with and, along with the plaintiff, were wholly dependent upon, the said J. L. Shinn, deceased;

4.

On and for sometime prior to August 15, 1967, the said J. L. Shinn was employed by the defendant, Mobil Oil Corporation at a salary of $1,249.00 per month;

5.

On and prior to August 15, 1967, the defendant employed the said J. L. Shinn as a seaman and member of the crew

of a certain vessel, namely, Penrod Drilling Barge 50, a submersible drilling vessel engaged, at all times pertinent hereto, in mineral exploration activities on navigable waters of the United States in the Gulf of Mexico above the Outer Continental Shelf more than a marine league from the shore of any State;

6.

On August 15, 1967, shortly after 3:20 p.m., the said J. L. Shinn was riding as a passenger in a certain "Jet Ranger" helicopter owned by the defendant, Mobil Oil Corporation and, at all times pertinent hereto, operated by an employee of said defendant, other than the said J.L. Shinn, in the course and scope of said employee's employment by the defendant as a helicopter operator;

7.

On August 15, 1967, at approximately 3:20 p.m., the aforementioned helicopter departed a platform or other structure situated in the Gulf of Mexico more than a marine league from the shore of any state, with the said J. L. Shinn aboard, destined for the aforementioned vessel, Penrod Drilling Barge 50 to which the said J. L. Shinn was assigned;

8.

At sometime shortly after 3:20 a.m. on August 15, 1967, the said helicopter failed and/or otherwise ceased to function and crashed into the sea;

9.

As a result of the aforementioned incident the said J. L. Shinn and all other persons aboard said helicopter lost their lives;

10.

As a consequence of the aforementioned disaster, plaintiff and the minor children of the decedent have been, are being and will be damaged to the extent of their pecuniary losses of support, nurture and inheritance due to the death of their husband and father in an amount not less than $225,000.00;

11.

The aforesaid disaster and damages result in whole or in part from the wrongful acts, neglect, default, negligence and dereliction of the defendant, Mobil Oil Corporation, its agents, servants, and employees, other than the said J. L. Shinn, in the operation, maintenance, care and supervision of the defendant's said helicopter, as well as from the unseaworthiness of the vessel on which the said decedent was employed, its appurtenances and appliances, including defendant's said helicopter;

12.

In the event, and only in the event, that the Court is unable to determine which of the aforementioned caused or contributed to the decedent's death, then, in that event, plaintiff avers that the fact of the helicopter's crash imposes

liability upon this defendant as a matter res ipsa loquitur, which said doctrine plaintiff specially pleads herein;

13.

At all times pertinent hereto and presently the defendant, Mobil Oil Corporation, was and is a corporation authorized to do and doing business within the jurisdiction of this Honorable Court;

14.

The plaintiff brings this action against the defendant pursuant to the provisions of the Jones Act and the Death on the High Seas Act, including all warranties embodied therein.

WHEREFORE, plaintiff, Mrs. Arline Jones Shinn, prays for judgment against the defendant, Mobil Oil Corporation, in the full sum of $225,000.00, with interest thereon from the date of commencement of the beneficiaries' losses hereinabove set forth, all costs and disbursements of this action and for all general and equitable relief.

KIERR and GAINSBURGH

By Samuel C. Gainsburgh
ATTORNEYS FOR
PLAINTIFF

Of Counsel
BERNARD E. BOUDREAUX, JR.
Lawless Building
Franklin, Louisiana

Filed
Aug. 12, 1968

ANSWER OF DEFENDANT MOBIL OIL CORPORATION

NO. 15,326

(Title omitted)

Defendant, Mobil Oil Corporation (hereinafter called "Mobil"), for its Answer to Plaintiff's Complaint, respectfully presents the following:

First Defense

The Complaint fails to state a claim against Defendant, Mobil Oil Corporation, upon which relief may be granted.

Second Defense

Defendant, Mobil, is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraphs 1, 2, and 3 of the Complaint.

Third Defense

Defendant, Mobil, admits the allegations contained in paragraph 4 of the Complaint.

Fourth Defense

As to paragraph 5 of Plaintiff's Complaint, Mobil denies that J. L. Shinn was employed as a seaman and member of the crew of any vessel at any time and further denies that Penrod Drilling Barge 50 is a vessel.

Mobil admits that J. L. Shinn was at all pertinent times a

Mobil employee and that his duties did, at times, require his presence on the Penrod Drilling Barge and that such Drilling Barge was engaged in mineral exploration activities on the Continental Shelf in the Gulf of Mexico more than one marine league from the shore of any state. It denies all other allegations of such paragraph except those specifically admitted.

Fifth Defense

Defendant, Mobil, admits that on August 15, 1967, shortly after 3:20 P.M., J. L. Shinn was riding as a passenger on a certain "Jet Ranger" helicopter owned by Mobil Oil Corporation and that on such date and at such time the said helicopter was operated by an employee of Mobil, other than J. L. Shinn, in the course and scope of such employee's employment as a helicopter operator. Defendant, Mobil, denies that at all times pertinent to the transaction complained of by plaintiff the helicopter described in paragraph 6 was operated by employees of Defendant.

Sixth Defense

As to paragraph 7 of plaintiff's complaint, Mobil denies that Penrod Drilling Barge 50 is a vessel and denies that J. L. Shinn's duties could be described as "assigning him to said drilling barge." The other allegations of said paragraph 7 are admitted.

Seventh Defense

The allegations of paragraph 8 and 9 of the Complaint are admitted.

Eighth Defense

The allegations of paragraphs 10, 11, 12, 13 and 14 of the Complaint are denied.

Ninth Defense

Defendant, Mobil, alleges that the accident described in paragraph 8 of plaintiff's complaint was the result of an unavoidable accident.

Tenth Defense

Defendant, Mobil, alleges that plaintiff has heretofore received and accepted benefits which accrued and were tendered to plaintiff by defendant under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq., which is the exclusive remedy available to plaintiff for damages arising out of the accident complained of.

WHEREFORE, Defendant, Mobil Oil Corporation, prays that the Complaint of Plaintiff, Arline J. Shinn, Individually and as Testamentary Executrix of the Succession of J. L. Shinn, Deceased, be dismissed as to Defendant Mobil Oil Corporation, and that it recover its costs and all other general relief.

W. H. TABB
RONALD L. NEILL

George B. Matthews
George A. Frilot
Attorneys for Mobil Oil Corp.

Filed
Sept. 3, 1968

AMENDED COMPLAINT FOR DAMAGES

NO. 15,326

(Title Omitted)

TO THE HONORABLE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION, AND THE JUDGES THEREOF:

The amended complaint of Mrs. Arline Jones, widow of J. L. Shinn, of lawful age, residing at Apartment 204, La Vista Apartments, San Marcos, Texas, through her undersigned counsel, respectfully alleges and shows unto the Honorable Court that:

A.

Plaintiff repeats and realleges each and every allegation heretofore set forth in paragraphs 1 through 14 of the original complaint as though repeated herein in toto and in extenso, insofar as the same may be pertinent hereto;

B.

Since the filing of the original complaint, the defendant, Mobil Oil Corporation, has filed a third party complaint revealing that said defendant, Mobil Oil Corporation, purchased the helicopter involved in this litigation from Bell Helicopter Company, a division of Bell Aerospace Corporation, and in which third party complaint defendant, Mobil Oil Corporation, alleges that if the catastrophe involved in

this litigation was the result of negligence, such negligence was that of Bell Helicopter Company, a division of Bell Aerospace Corporation, in the design, manufacture and sale of the helicopter to Mobil Oil Corporation, defendant herein, and further that such negligence was the direct and proximate cause of the catastrophe involved in this litigation.

C.

In view of the foregoing, if established by the evidence and proof of the parties, plaintiff is entitled to recover her said damages from Bell Helicopter Company, a division of Bell Aerospace Corporation, and/or Mobil Oil Corporation;

D.

Therefore, plaintiff desires to make the said Bell Helicopter Company, a division of Bell Aerospace Corporation, a party defendant in these proceedings:

WHEREFORE, plaintiff prays that:

1. She be permitted to file this amended complaint;

2. Bell Helicopter Company, a division of Bell Aerospace Corporation, be made a party defendant herein; and

3. She may have judgment against Mobil Oil Corporation and Bell Helicopter Company, a division of Bell Aerospace Corporation, jointly, severally, or in solido, in the full sum of $225,000.00, with interest thereon from the date of commencement of the beneficiaries losses hereinabove set

forth, all costs and disbursements of this actior. and for all general and equitable relief.

Kierr and Gainsburgh

By Samuel C. Gainsburgh

Filed
Nov. 13, 1968

AMENDED COMPLAINT FOR DAMAGES

NO. 15,326

(Title Omitted)

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF LOUISIANA, OPELOUSAS DIVISION:

The amended complaint of Mrs. Arline Jones, widow of J. L. Shinn, of lawful age, residing at apartment 204, La Vista Apartments, San Marcos, Texas, through her undersigned counsel, respectfully alleges and shows to this Honorable Court that:

1.

Plaintiff repeats and re-alleges each and every allegation heretofore set forth in paragraphs 1 through 14 of the original complaint and paragraphs A, B, C, and D of the first

amended complaint as though repeated herein in toto and in extenso, insofar as the same may be pertinent hereto.

2.

Plaintiff avers that the said crash, death and resulting damages were caused or contributed to by defendant, Bell Helicopter Company, a division of Bell Aerospace Corporation, by its officers, agents and employees, in negligently designing, manufacturing, selling, modifying or failing to properly and timely modify, servicing or failing to properly service said helicopter and its component parts; in creating a dangerous condition aboard said helicopter and in failing timely to warn of said dangerous condition; in failing to timely modify or remove or in failing to properly modify or remove said dangerous condition; in failing to take all means and precautions necessary in order to avoid said crash; and defendant was otherwise negligent; further, plaintiff avers that said defendant breached its warranty, both express and implied, of the fitness of its said product and plaintiff avers that said defendant is liable to plaintiff on the theory of strict tort liability, under all applicable laws.

3.

Plaintiff brings this action against defendant, Bell Helicopter Company, a division of Bell Aerospace Corporation, pursuant to the provisions of the Death On The High Seas Act, including all warranties embodied therein, the General Maritime Law, and the laws of the State of Texas as they may apply.

WHEREFORE, plaintiff respectfully prays that she be permitted to file this amended complaint and for judgment as heretofore prayed for.

KIERR AND GAINSBURGH

Filed
Dec. 30, 1970

By Jack C. Benjamin

ANSWER OF DEFENDANT, MOBIL OIL CORPORATION, TO PLAINTIFF'S AMENDED COMPLAINT FOR DAMAGES

NO. 15,326

(Title Omitted)

Now into Court through undersigned counsel comes defendant, Mobil Oil Corporation, and for its answer to plaintiff's amended complaint for damages respectfully represents that:

1.

The original Answer and Third-Party Complaint and the Supplemental and Amending Answer and Third-Party Complaint of Mobil Oil Corporation are referred to and made a part hereof by reference as though copied in extenso herein.

2.

The allegations of paragraph 1 of the Amended Com-

plaint for Damages are denied insofar as they are applicable to Mobil Oil Corporation.

3.

The allegations of paragraphs 2 and 3 of the Amended Complaint for Damages are not applicable to Mobil Oil Corporation and, as such, no answer is required by Mobil.

WHEREFORE, defendant, Mobil Oil Corporation, prays that the complaint, and both amended complaints for damages of plaintiff, Mrs. Arline J. Shinn, individually and as testamentary executrix of the succession of J. L. Shinn, deceased, be dismissed as to defendant, Mobil Oil Corporation, and that it recover its costs and all other general and equitable relief.

CARL J. SCHUMACHER, JR.,
By /s/ Robert E. Badger

Robert E. Badger

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March 9, 1971

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RL 5 PAGE 18

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76-1726

MOBIL OIL CORPORATION
Petitioner

versus

FRANCES NELL HIGGINBOTHAM,
ADMINISTRATRIX OF THE ESTATE OF
MARSHALL K. HIGGINBOTHAM, ET AL.,
Respondent

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

SAAL & SAAL
I. P. Saal, Jr.
Post Office Box 176
Gueydan, Louisiana 70542

Counsel for Respondents
Jeanette LeBlanc Nation,
et al.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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IN THE
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FRANCES NELL HIGGINBOTHAM, ADMINISTRATRIX OF THE ESTATE OF MARSHALL K. HIGGINBOTHAM, ET AL.,
Respondents

Brief in Response to Petition for Writ of Certiorari

STATEMENT OF THE CASE

On August 15, 1967, a Bell Jet Ranger helicopter, owned by Mobil Oil Corporation, petitioner herein, crashed on the high seas off the coast of Louisiana. The three passengers and pilot of the helicopter were killed in the crash. Shortly before the crash, the helicopter, which was used by Mobil in its offshore oil and gas drilling operations, had picked up several passengers at an offshore platform. The passengers aboard the helicopter were Marshall K. Higginbotham, an employee of Baxter Drilling Company, and James Shinn and James Nation, both employees of Mobil.

Four [illegible] were filed and the cases were consolidated for trial in t[illegible]wer court. In the non-jury trial in the District Court, it was held [illegible] insofar as the survivors of Higginbotham were concerned, remedies were available under the Death on the High Seas Act, and the General Maritime Law as set forth in *Moragne v. States Marine Lines, Inc.*, 398 U. S. 375, 90 S.Ct. 1772 (1970). As to the decedent, Shinn, a

Mobil employee, the District Court held his survivors to have actions under DOHSA, the General Maritime Law and the Jones Act. The District Court found the exclusive remedy of the survivors of Nation, who was found to have been assigned to a fixed platform on the Outer Continental Shelf at the time of his death, to be the benefits available under the Longshoremen and Harbor Workers Compensation Act as made applicable to the Outer Continental Shelf by the Lands Act (43 U.S.C.A. Sec. 1331, et seq.)

Following the trial of the case, the Court held Mobil liable to the survivors of Higginbotham and Shinn on the basis of res ipsa loquitor.

On appeal to the United States Court of Appeal, Fifth Circuit, the finding of liability against Mobil on the basis of res ipsa loquitor was affirmed. The Court further affirmed the finding of the available remedies to the survivors of Higginbotham and Shinn and reversed the District Court's ruling as to the status of Nation. The Fifth Circuit found the lower court had committed an error of law in determining that Nation was not a seaman. Therefore, the Court of Appeal correctly applying the applicable law, found Nation to be a seaman, thus making available to his survivors the remedies provided under the Death on the High Seas Act, the General Maritime Law, and the Jones Act. The Fifth Circuit also reversed the award of damages to the survivors of Higginbotham, holding that the award contained an inflationary factor, and remanded the case to the District Court to determine what, if any, inflationary factor was present in the awards or if the future wage loss was only as a result of a productivity factor. This issue is pending in this Court on an application for writs in No. 76-1722.

Following the rendition of the judgment by the Fifth Circuit, petitioner herein filed these writs seeking to have this Honorable Court review the judgment of the Court of Appeal on several points.

First, petitioner seeks to have the Court determine whether the wrongful death action created by *Moragne* applies only to territorial waters, and not to those waters covered by DOHSA. Secondly, petitioner seeks review of the Fifth Circuit's holding that Nation was in fact a seaman. Thirdly, review is sought concerning the finding of res ipsa loquitor as used against Mobil only.

In response to the request of this Honorable Court, respondents, Jeanette LeBlanc Nation, as personal representative of the decedent, James E. Nation, for the exclusive benefit of his surviving spouse, Ella Menard Nation and his son, Roy Glen Nation, submit this brief in opposition to various portions of the petition for certiorari filed herein by Mobil.

I.

In *Moragne v. States Marine Lines, Inc.*, supra, this Honorable Court, in a unanimous opinion authored by Mr. Justice Harlan, announced the creation of a wrongful death remedy under the General Maritime Law. Prior to that time, it had long been held that in the absence of a statutory remedy for wrongful death, no such action was available. *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140 (1886). In overruling *The Harrisburg*, supra, and its sequels Justice Harlan stated that this result was necessary to remedy at least three "anomalies" then existing in the Maritime Law:

(1) Some victims of accidents in territorial waters could recover under the doctrine of unseaworthiness if they were injured, but not if they were killed;

(2) There could be recovery under DOHSA for deaths on the high seas caused by unseaworthiness, but no recovery for deaths within territorial waters of states where the applicable wrongful death statute did not encompass the doctrine of unseaworthiness;

(3) A Sieracki type seaman could recover for death caused by unseaworthiness within territorial waters if the applicable state statute allowed such recovery, but a Jones Act seaman had no such remedy available to him.

The *Moragne* holding thus did away with these anomalies by providing for a uniform wrongful death action under the General Maritime Law. The specifics of the action, such as who the beneficiaries might be, the applicable statute of limitations, and the damages recoverable were not then determined by the Court, but left to be sifted out through the lower courts in future cases.

Subsequently, in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806 (1974), the court found that the damages recoverable under the *Moragne* wrongful death action are not limited to pecuniary losses, but may also encompass such items of recovery as loss of society. The court rejected the pecuniary loss test of DOHSA as inconsistent with "the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction." 414 U.S. at 588, 945 S.Ct. at 816.

In its petition for certiorari, Mobil contends that the wrongful death action created in *Moragne* is limited in its scope to state territorial waters. This is necessary, petitioner argues, because DOHSA already provided a remedy for deaths occurring more than a marine league from shore. Obviously,if this view advanced by the petitioner correctly states the holding of *Moragne*, then petitioner's liability to the survivors of the unfortunate passengers of the ill-fated helicopter would be restricted to the recoveries provided in the Death on the High Seas Act and, in the case of Shinn and Nation, the Jones Act also.

Respondents herein submit that this argument advanced by petitioner fails to comprehend the true scope of the *Moragne* decision. The case which *Moragne* expressly overruled, *The Harrisburg*, supra, had consistently held that there was no wrongful death action under the General Maritime Law regardless of where the death occurred. There was no limitation in this doctrine as to territorial waters or high seas. The express overruling of *The Harrisburg*, supra, and the creation of the maritime wrongful death action, must also be interpreted to encompass the entirety of the navigable waters subject to the maritime jurisdiction, be they territorial waters or the high seas. To adopt any other interpretation of the decision is not consistent with the express holding of the Court. Further, there is nothing in the *Moragne* opinion or in *Gaudet* which followed shortly thereafter, which indicates that the Court intended to restrict *Moragne*'s ambit to territorial waters. This conclusion is supported by such eminent authorities as Gilmore and Black, *The Law of Admiralty*, 2nd Ed., 1975, P. 368, who state:

"From Justice Harlan's discussion of the 'anomalies' which the Moragne decision was designed to avoid, several conclusions clearly follow. The Moragne remedy covers deaths within territorial waters as well as deaths on the high seas. The remedy provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness although in the latter case the decedent must have been a person (e.g., a Jones Act seaman) entitled to the warranty of seaworthiness. As to deaths within state territorial waters, the question whether a state wrongful death statute affords recovery for unseaworthiness is no longer relevant since the remedy is provided by maritime law."

Since the rendition of the *Moragne* ruling, the great majority of lower courts which have dealt with the question presented here, that is, whether the *Moragne* cause of action should be restricted to territorial waters, have concluded there is no such restriction. These cases, citing the clear directive of *Moragne*, have consistently permitted the wrongful death action in instances where the death occurred on the high seas, an area where DOHSA would previously have afforded the sole remedy for non-seamen. See: *Sennett v. Shell Oil Co.*, 325 F.Supp. 1 (E.D. La., 1971); *Powell v. F.J. O'Hara & Sons, Inc.*, 411 F.Supp. 377 (S.D. Me. 1976); *Renner v. Rockwell International Corp.*, 403 F. Supp. 849 (C.D. Cal., 1975); *Estate of Kauzlarich v. Exxon Co.*, U.S.A., 405 F.Supp. 332 (D.C. S.C., 1975); *Nye v. A/SD/S Svendborg*, 358 F.Supp. 145 (S.D.N.Y. 1973); *Law v. Sea Drilling Corp.*, 510 F.2d 243 (C.A. 5th Cir., 1975) and application for rehearing, 523 F.2d 793; (C.A.

5th Cir., 1975).

Petitioner also argues that to allow a *Moragne* type action on the high seas, where the Death on the High Seas Act already provides a statutory remedy, amounts to a judicial reconstruction of DOHSA. However, as Justice Harlan noted in *Moragne*, "no intention appears that the act have the effect of foreclosing any non-statutory remedies that might be found appropriate to effectuate the policies of general maritime law." 398 U.S. at 400, 90 S.Ct. at 1787.

In support of its limited interpretation of *Moragne*, petitioner cites the First Circuit Court of Appeal's decision in *Barbe v. Drummond*, 507 F.2d 794, (C.A. 1st Cir. 1974). In *Barbe*, supra, the First Circuit held that since DOHSA already provided a wrongful death cause of action for deaths occurring on the high seas, *Moragne* was inapplicable, thus the pecuniary loss standard of DOHSA controlled in the fixing of damages. 507 F.2d at P. 801. The fallacy of this position was demonstrated by Chief Judge John Brown of the Fifth Circuit Court of Appeals in the opinion rendered on the application for rehearing in *Law v. Sea Drilling Corp.*, 523 F.2d 793 (C.A. 5th Cir. 1975). In his opinion, Chief Judge Brown contrasted the view adopted by the Fifth Circuit in *Law* with the approach followed by the First Circuit in *Barbe*. He clearly demonstrated that the *Barbe* analysis of *Moragne* simply led to the creation of additional anomalies in the maritime law, the exact situation sought to be remedied by the court in *Moragne*: (523 F.2d at pp. 796-798)

> "That the Moragne remedy has replaced - or at least augmented - DOHSA seems even more cor-

rect to us when the alternative is examined. The *Barbe* position that the DOHSA standard still carries the day on the high seas adds another anomaly to the three that Mr. Justice Harlan hoped to lay to rest in *Moragne*. Simply stated, this fourth anomaly is that under the *Barbe* holding a claimant under substantive maritime law who brought suit at law (either the law side of the federal district court or the state court) under the Savings to Suitors Clause would be entitled to the full panoply of recovery under *Moragne* while those unfortunates who could not meet the requisites of diversity jurisdiction or get personal jurisdiction in either the state or federal court, would be restricted to the DOHSA pecuniary loss. This is because as Mr. Justice Harlan suggested in *Moragne*, the widely assumed exclusively [sic] of DOHSA does not mean that it is the only remedy. What it does mean is that DOHSA suits must be brought in admiralty - a suit for damages in the district courts of the United States, in admiralty * * * ' 46 U.S.C.A. §761.

* * * *

"Where this leaves us is that the alternative to our holding is to impose an unwieldy trifid system on recovery for maritime deaths.[i] If the death occurred within territorial waters, recovery could be had under the *Moragne* wrongful death - survival action. [ii] If the death occurred on the High Seas and the unwary pleader invoked the magical provisions of F.R. Civ. P. 9(h), or in the unlikely event that he could not obtain jurisdiction in any state court, full survival recovery

could be had under the decisional law-created federal maritime survival action but wrongful death recovery would be limited to DOHSA's pecuniary loss.' And [iii] the legal helmsman with a closer eye on the telltale-for the same death on the High Seas - could file his action at law and under substantive maritime principles would recover all that *Moragne* and *Gaudet* allow." (Footnotes omitted).

In summary, the decision of this Honorable Court in *Moragne v. Marine Lines, Inc.*, supra, clearly established a wrongful death action under the General Maritime Law. This action is available whether the death occurred within state territorial waters or upon the high seas. To argue that the new action created by Moragne cannot exist side by side with the previously existing action available under DOHSA fails to consider the fact that DOHSA has, for many years, existed side by side with the Jones Act, which also allows recovery for maritime wrongful death. Further, to limit the holding in Moragne to state territorial waters would necessarily create an entirely new set of "anomalies" to replace those Mr. Justice Harlan sought to remedy by his decision in *Moragne*.

In light of the foregoing, it is respectfully submitted that the decisions of this Court make it entirely clear that *Moragne* provides a wrongful death action on any navigable waters, be they state territorial waters or the high seas. Therefore, there is no requirement that a writ of certiorari issue to consider this point.

II.

As its second reason for requesting this Court to issue a

writ of certiorari, petitioner asserts that the Court of Appeal erred in determining that James E. Nation was a seaman on the date of his death therefore entitling his survivors to recovery under the General Maritime Law, Death on the High Seas Act, and the Jones Act. Petitioner asserts that the holding of the Fifth Circuit is improper in that the correct test to be applied in determining the status of Nation was his assignment on date of death.

At the trial of this case in the District Court, it was held that "as a matter of law his seaman's status is determined by the situs of his work at the time of his injury and that he was not therefore a seaman on the date of his death. 357 F. Supp. 1164 at 1177 (W.D. La. 1973)." On appeal, the Fifth Circuit determined that the trial judge committed reversible error in applying the situs test to determine Nation's status. The court determined that the situs of the work is not determinative in a Jones Act case, thus the decision of the lower court was an error of law, leaving the appellate tribunal to review the findings of fact free of the restriction imposed by the clearly erroneous rule. 545 F.2d at 433. In reviewing the facts adduced at the trial, the Fifth Circuit correctly concluded that Nation was in fact a seaman.

It is submitted that the decision of the Fifth Circuit properly applied the existing law as found by this Honorable Court. In determining whether or not an individual is a seaman within the meaning of the Jones Act, the initial determination is not the situs of the work as petitioner would have the court hold, but in fact whether or not the individual is a member of the crew of a vessel. *Swanson v. Marra Bros.*, 328 U.S. 1, 66 S.Ct. 869 (1946). In making

this determination, the question to be answered is whether the person claiming the status of a seaman was permanently assigned to a vessel (which may include a special purpose structure not usually employed as a means of transport by water, but designed to float on water) or whether the individual performed a substantial part of his work duties on the vessel. *Offshore Company v. Robison*, 266 F.2d 769 (C.A. 5th Cir. 1959). Subsequent cases have held that an individual may claim seaman status despite being stationed on several different vessels during the course of his employment. *Magnolia Towing Co. v. Pace*, 378 F.2d 12 (C.A. 5th Cir. 1967); *Braniff v. Jackson Avenue - Gretna Ferry, Inc.*, 280 F.2d 523 (C.A. 5th Cir. 1960). Additionally, once it becomes clear that a claimant is entitled to status as a seaman, recovery is permitted under the Jones Act even if he suffers injuries while off the vessel and engaged in temporary work for his employer which is unrelated to the service of the ship. *Braen v. Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 129, 80 S.Ct. 247 (1959).

With these principles clearly established, it is evident that the Fifth Circuit properly held Nation to be a seaman. Testimony adduced at the District Court trial showed that in the two years preceding the date of the accident, Nation spent a major portion of his time on various submersible drilling barges either owned or under contract to his employer, Mobil. He had last worked aboard a submersible rig only two weeks prior to his assignment to the fixed platform from which the helicopter took off on August 15, 1967. In fact, the only reason he was working on a fixed platform was as a temporary replacement for another Mobil employee who was on vacation. Under these circumstances, it is eminently clear that Nation, through his course of em-

ployment with Mobil on various submersible barges, was a seaman who, on the date of his accident, was assigned temporarily by his employer to work not related to any particular vessel. It was, however, work for the benefit of his employer. The situation in regard to Nation was the same as that of a seaman who while ashore on a mission for his employer, receives an injury. He was a seaman prior to being temporarily assigned to the fixed platform in question and did not lose the status by his mere two-week assignment there. Thus, the Fifth Circuit properly held him to be a seaman and his survivors are justly entitled to the benefits and remedies accruing therefrom.

For these reasons, it is submitted that there is no error in the Fifth Circuit holding that Nation was a seaman as this holding is thoroughly consistent with the law as enunciated by this Honorable Court. The judgment of the trial court was clearly erroneous in holding that as a matter of law Nation's status was determined by the situs of his work, thus the Fifth Circuit properly reviewed the facts and applied the proper test required by law. Therefore, there is no necessity for this Honorable Court to exercise its discretion by issuing the writ prayed for by petitioner herein.

III.

Petitioner also requests that this Honorable Court review the decision of both the trial court and the Court of Appeal in applying the doctrine of res ipsa loquitor to find petitioner liable to the survivors of the decedents, Shinn, Higginbotham and Nation. Petitioner asserts that the record did not contain sufficient evidence to maintain the application of this doctrine and further that the doctrine could not be properly applied only to Mobil and not to the other defen-

dant, Bell, as well.

At the trial of the case, a substantial amount of evidence was presented by the various plaintiffs, including petitioner, which sought to show that the crash of the helicopter was due to a defect in its design, construction or manufacture. However, the district judge ruled that the evidence submitted by the plaintiffs was insufficient to hold the manufacturer liable. In fact, it was his finding that there was no evidence to show the specific cause of the crash. However, based upon the totality of the evidence presented, including evidence as to the maintenance schedule of Mobil, the flight record of Mobil helicopters and the past flight history of the particular pilot in question, the court did find that the evidence was sufficient to support holding Mobil liable to the plaintiffs on the basis of res ipsa loquitor. This finding by the trial court was upheld by the Fifth Circuit on appeal.

The doctrine of res ipsa loquitor may be succinctly stated as follows:

> "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." Prosser, *Law of Torts*, 4th Edition, 1971, p. 214.

As can be seen from this statement, the doctrine of res ipsa

loquitor essentially requires the occurrence of an act which would not ordinarily happen in the absence of negligence on the part of someone. Further, the defendant against whom the doctrine is invoked must have the exclusive control of the instrument which caused the injury.

Regarding the first requirement, the Fifth Circuit held that the current state of the art in aircraft design, construction, travel, technology, pilot training, etc. now supports the conclusion that aircraft crashes do not normally occur in the absence of negligence. As was stated by the Fifth Circuit in *Williams v. The United States*, 218 F.2d 473 (C.A. 5th Cir. 1955):

> "Res ipsa loquitor is a rule based upon human experience and its application to a particular situation must necessarily vary with human experience. A situation to which the doctrine was not applicable a half century ago because of insufficient experience or a lack of technical knowledge, might today fall within the scope of the rule, depending upon what experience has shown."

On this basis, the Fifth Circuit did not follow the holding in *Morrison v. LeTourneau Co.*, 138 F.2d 339. In *Morrison*, supra, the court had held that res ipsa loquitor could not apply because there was no showing that such accidents do not ordinarily happen even to the most skillful pilot in the finest type airplanes available in 1940. Without doubt, the aircraft industry had made many technological advances in the twenty-four years between the judgment in *Morrison* and the crash of the helicopter involved

in the instant case. Thus, the Fifth Circuit's decision to apply res ipsa loquitor in this instance was clearly correct.

Further support of the application of res ipsa loquitor is supplied by the fact that Mobil was in exclusive control of the helicopter. The helicopter was subject to maintenance by employees of Mobil, Mobil pilots flew the helicopters and the helicopters were stored at Mobil facilities. Therefore, the second element of res ipsa loquitor, that is, the element of control, cannot be denied by petitioner.

That the doctrine was invoked against only one defendant is not a basis for granting the writ sought by petitioner. There was, of course, evidence presented which tended to show that the crash was due to the defective construction and design of the Bell Helicopter. However, this evidence was found insufficient to warrant holding Bell Liable by the district judge. Only after reaching this conclusion, did he then seek to apply res ipsa loquitor to the facts of this case. As stated in his opinion, "the doctrine of res ipsa loquitor in the light of the total effect of the evidence, affords a reasonable inference of fault and is properly applicable to the facts of this litigation." The facts relied on by the trial court included the maintenance record, the flight records of Mobil helicopters, and of the record of the particular pilot in question. These facts were sufficient for the application of res ipsa loquitor by the trial judge. *Higginbotham vs. Mobil*, 357 F. Supp., at Page 1174.

Further, in order to apply res ipsa loquitor, a plaintiff is not required to exclude all other possible theories beyond a reasonable doubt. It is enough that he makes out a case from which the finder of fact may reasonably conclude

that the negligence, more probably than not, was that of the defendant. Restatement (Second) of Torts, Section 328 (D) Comment Subsection (b). As stated by the trial court, the evidence taken as a whole supported the conclusion that res ipsa loquitor was properly applicable against Mobil but not against Bell. The evidence against Bell was merely insufficient to establish liability on its part on a products liability claim. This did not foreclose a finding of negligence against Mobil based on the doctrine of res ipsa loquitor.

Finally, as the Fifth Circuit noted in its opinion, (545 F. 2d at 431).

> "In any event, we may reverse the lower Court's finding of negligence only if we are convinced that it is clearly erroneous. See *Kennedy v. Henderschied*, 5th Cir. 1973, 490 F.2d 85. We are not left with the definite and firm conviction that Judge Scott erred in the inferences he drew from the circumstances of this case or in his conclusion that Mobil failed to rebut those inferences."

Respondents submit the facts relied upon by Judge Scott were a sufficient basis for the application of res ipsa loquitor to the instant case. In the absence of clear error on his part, the judgment of the Fifth Circuit properly affirmed the trial court's decision, and no basis for the granting of petitioner's writ thus appears in the record of this case.

CONCLUSION

In summary, respondents submit that petitioner's arguments relative to the application of *Moragne* to territorial waters only is simply not supported by the *Moragne* decision itself, the cases subsequent to *Moragne*, and leading authorities in the field. This point being settled against the position adopted by petitioner, there is no reason that a writ should issue from this court to review that point.

Further, respondents submit that the Fifth Circuit Court of Appeal properly applied the correct legal test in determining the status of James E. Nation and that the decision of that appellate tribunal was correct on the facts of the instant case, again precluding the necessity of a writ of certiorari to review that holding.

Finally, the application of the well established doctrine of res ipsa loquitor to the facts of the instant case, resulting in the imposition of liability against Mobil only, was clearly supported by the facts shown at the trial of the case and by the law made applicable to these facts through the many years of judicial experience.

Therefore, respondents respectfully urge that this Honorable Court decline to exercise its discretion in issuing a writ of certiorari as requested by petitioner, and let the judgment of the Fifth Circuit Court of Appeal stand as rendered on the issues presented herein.

Respectfully submitted,

SAAL & SAAL

I.P. Saal, Jr.
Post Office Box 176
Gueydan, Louisiana 70542
(318) 536-9210
Counsel for Jeanette LeBlanc
Nation, et al.,

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing has this date been forwarded to Mr. Carl J. Schumacher, Jr., Attorney for Defendant, Mobil Oil Corporation, 1106 Arabella Street, New Orleans, Louisiana 70115, and Mr. A.R. Christovich, Christovich & Kearney, 1815 American Bank Building, New Orleans, Louisiana by placing same in the United States mail postage prepaid and properly addressed.

Gueydan, Louisiana this 8th day of September, 1977.

I. P. Saal, Jr.

Supreme Court, U. S.
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THOMPSON & SELLERS
Charles M. Thompson, Jr.
Post Office Box 308
Abbeville, Louisiana 70510
(318) 893-3107

Counsel for Respondent,
Francis Nell Higginbotham, et al.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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IN THE
UNITED STATES SUPREME COURT

NO. 76-1726

MOBILE OIL CORPORATION,
Petitioner

versus

FRANCES NELL HIGGINBOTHAM, ADMINISTRATRIX OF THE ESTATE OF MARSHALL K. HIGGINBOTHAM, ET AL.,
Respondents

Brief in Response to Petition for Writ of Certiorari

STATEMENT OF THE CASE

On August 15, 1967, a Bell Jet Ranger helicopter, owned by Mobil Oil Corporation, petitioner herein, crashed on the high seas off the coast of Louisiana. The three passengers and pilot of the helicopter were killed in the crash. Shortly before the crash, the helicopter, which was used by Mobil in its offshore oil and gas drilling operations, had picked up several passengers at an offshore platform. The passengers aboard the helicopter were Marshall K. Higginbotham, an employee of Baxter Drilling Company, and James Shinn and James Nation, both employees of Mobil.

Four suits were filed and the cases were consolidated for trial in the lower court. In the non-jury trial in the District Court, it was held that insofar as the survivors of Higginbotham were concerned, remedies were available under the Death on the High Seas Act, and the General Maritime Law as set forth in *Moragne v. States Marine Lines, Inc.*, 398 U. S. 375, 90 S.Ct. 1772 (1970). As to the decedent, Shinn, a

Mobil employee, the District Court held his survivors to have actions under DOHSA, the General Maritime Law and the Jones Act. The District Court found the exclusive remedy of the survivors of Nation, who was found to have been assigned to a fixed platform on the Outer Continental Shelf at the time of his death, to be the benefits available under the Longshoremen and Harbor Workers Compensation Act as made applicable to the Outer Continental Shelf by the Lands Act (43 U.S.C.A. Sec. 1331, et seq.)

Following the trial of the case, the Court held Mobil liable to the survivors of Higginbotham and Shinn on the basis of res ipsa loquitor.

On appeal to the United States Court of Appeal, Fifth Circuit, the finding of liability against Mobil on the basis of res ipsa loquitor was affirmed. The Court further affirmed the finding of the available remedies to the survivors of Higginbotham and Shinn and reversed the District Court's ruling as to the status of Nation. The Fifth Circuit found the lower court had committed an error of law in determining that Nation was not a seaman. Therefore, the Court of Appeal correctly applying the applicable law, found Nation to be a seaman, thus making available to his survivors the remedies provided under the Death on the High Seas Act, the General Maritime Law, and the Jones Act. The Fifth Circuit also reversed the award of damages to the survivors of Higginbotham, holding that the award contained an inflationary factor, and remanded the case to the District Court to determine what, if any, inflationary factor was present in the awards or if the future wage loss was only as a result of a productivity factor. This issue is pending in this Court on an application for writs in No. 76-1722.

Following the rendition of the judgment by the Fifth Circuit, petitioner herein filed these writs seeking to have this Honorable Court review the judgment of the Court of Appeal on several points.

First, petitioner seeks to have the Court determine whether the wrongful death action created by *Moragne* applies only to territorial waters, and not to those waters covered by DOHSA. Secondly, petitioner seeks review of the Fifth Circuit's holding that Nation was in fact a seaman. Thirdly, review is sought concerning the finding of res ipsa loquitor as used against Mobil only.

In response to the request of this Honorable Court, respondents Francis Nell Higginbotham and Donna Joyce Higginbotham submit this brief in opposition to various portions of the petition for certiorari filed herein by Mobil.

I.

In *Moragne v. States Marine Lines, Inc.*, supra, this Honorable Court, in a unanimous opinion authored by Mr. Justice Harlan, announced the creation of a wrongful death remedy under the General Maritime Law. Prior to that time, it had long been held that in the absence of a statutory remedy for wrongful death, no such action was available. *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140 (1886). In overruling *The Harrisburg*, supra, and its sequels Justice Harlan stated that this result was necessary to remedy at least three "anomalies" then existing in the Maritime Law:

(1) Some victims of accidents in territorial waters could recover under the doctrine of unseaworthiness if they were injured, but not if they were killed;

(2) There could be recovery under DOHSA for deaths on the high seas caused by unseaworthiness, but no recovery for deaths within territorial waters of states where the applicable wrongful death statute did not encompass the doctrine of unseaworthiness;

(3) A Sieracki type seaman could recover for death caused by unseaworthiness within territorial waters if the applicable state statute allowed such recovery, but a Jones Act seaman had no such remedy available to him.

The *Moragne* holding thus did away with these anomalies by providing for a uniform wrongful death action under the General Maritime Law. The specifics of the action, such as who the beneficiaries might be, the applicable statute of limitations, and the damages recoverable were not then determined by the Court, but left to be sifted out through the lower courts in future cases.

Subsequently, in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806 (1974), the court found that the damages recoverable under the *Moragne* wrongful death action are not limited to pecuniary losses, but may also encompass such items of recovery as loss of society. The court rejected the pecuniary loss test of DOHSA as inconsistent with "the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction." 414 U.S. at 588, 945 S.Ct. at 816.

In its petition for certiorari, Mobil contends that the wrongful death action created in *Moragne* is limited in its scope to state territorial waters. This is necessary, petitioner argues, because DOHSA already provided a remedy for deaths occurring more than a marine league from shore. Obviously,if this view advanced by the petitioner correctly states the holding of *Moragne*, then petitioner's liability to the survivors of the unfortunate passengers of the ill-fated helicopter would be restricted to the recoveries provided in the Death on the High Seas Act and, in the case of Shinn and Nation, the Jones Act also.

Respondents herein submit that this argument advanced by petitioner fails to comprehend the true scope of the *Moragne* decision. The case which *Moragne* expressly overruled, *The Harrisburg*, supra, had consistently held that there was no wrongful death action under the General Maritime Law regardless of where the death occurred. There was no limitation in this doctrine as to territorial waters or high seas. The express overruling of *The Harrisburg*, supra, and the creation of the maritime wrongful death action, must also be interpreted to encompass the entirety of the navigable waters subject to the maritime jurisdiction, be they territorial waters or the high seas. To adopt any other interpretation of the decision is not consistent with the express holding of the Court. Further, there is nothing in the *Moragne* opinion or in *Gaudet* which followed shortly thereafter, which indicates that the Court intended to restrict *Moragne's* ambit to territorial waters. This conclusion is supported by such eminent authorities as Gilmore and Black, *The Law of Admiralty*, 2nd Ed., 1975, P. 368, who state:

"From Justice Harlan's discussion of the 'anomalies' which the Moragne decision was designed to avoid, several conclusions clearly follow. The Moragne remedy covers deaths within territorial waters as well as deaths on the high seas. The remedy provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness although in the latter case the decedent must have been a person (e.g., a Jones Act seaman) entitled to the warranty of seaworthiness. As to deaths within state territorial waters, the question whether a state wrongful death statute affords recovery for unseaworthiness is no longer relevant since the remedy is provided by maritime law."

Since the rendition of the *Moragne* ruling, the great majority of lower courts which have dealt with the question presented here, that is, whether the *Moragne* cause of action should be restricted to territorial waters, have concluded there is no such restriction. These cases, citing the clear directive of *Moragne*, have consistently permitted the wrongful death action in instances where the death occurred on the high seas, an area where DOHSA would previously have afforded the sole remedy for non-seamen. See: *Sennett v. Shell Oil Co.*, 325 F.Supp. 1 (E.D. La., 1971); *Powell v. F.J. O'Hara & Sons, Inc.*, 411 F.Supp. 377 (S.D. Me. 1976); *Renner v. Rockwell International Corp.*, 403 F. Supp. 849 (C.D. Cal., 1975); *Estate of Kauzlarich v. Exxon Co.*, U.S.A., 405 F.Supp. 332 (D.C. S.C., 1975); *Nye v. A/SD/S Svendborg*, 358 F.Supp. 145 (S.D.N.Y. 1973); *Law v. Sea Drilling Corp.*, 510 F.2d 243 (C.A. 5th Cir., 1975) and application for rehearing, 523 F.2d 793; (C.A.

5th Cir., 1975).

Petitioner also argues that to allow a *Moragne* type action on the high seas, where the Death on the High Seas Act already provides a statutory remedy, amounts to a judicial reconstruction of DOHSA. However, as Justice Harlan noted in *Moragne*, "no intention appears that the act have the effect of foreclosing any non-statutory remedies that might be found appropriate to effectuate the policies of general maritime law." 398 U.S. at 400, 90 S.Ct. at 1787.

In support of its limited interpretation of *Moragne*, petitioner cites the First Circuit Court of Appeal's decision in *Barbe v. Drummond*, 507 F.2d 794, (C.A. 1st Cir. 1974). In *Barbe*, supra, the First Circuit held that since DOHSA already provided a wrongful death cause of action for deaths occurring on the high seas, *Moragne* was inapplicable, thus the pecuniary loss standard of DOHSA controlled in the fixing of damages. 507 F.2d at P. 801. The fallacy of this position was demonstrated by Chief Judge John Brown of the Fifth Circuit Court of Appeals in the opinion rendered on the application for rehearing in *Law v. Sea Drilling Corp.*, 523 F.2d 793 (C.A. 5th Cir. 1975). In his opinion, Chief Judge Brown contrasted the view adopted by the Fifth Circuit in *Law* with the approach followed by the First Circuit in *Barbe*. He clearly demonstrated that the *Barbe* analysis of *Moragne* simply led to the creation of additional anomalies in the maritime law, the exact situation sought to be remedied by the court in *Moragne*: (523 F.2d at pp. 796-798)

> "That the Moragne remedy has replaced - or at least augmented - DOHSA seems even more cor-

rect to us when the alternative is examined. The *Barbe* position that the DOHSA standard still carries the day on the high seas adds another anomaly to the three that Mr. Justice Harlan hoped to lay to rest in *Moragne*. Simply stated, this fourth anomaly is that under the *Barbe* holding a claimant under substantive maritime law who brought suit at law (either the law side of the federal district court or the state court) under the Savings to Suitors Clause would be entitled to the full panoply of recovery under *Moragne* while those unfortunates who could not meet the requisites of diversity jurisdiction or get personal jurisdiction in either the state or federal court, would be restricted to the DOHSA pecuniary loss. This is because as Mr. Justice Harlan suggested in *Moragne*, the widely assumed exclusively [sic] of DOHSA does not mean that it is the only remedy. What it does mean is that DOHSA suits must be brought in admiralty - a suit for damages in the district courts of the United States, in admiralty * * * ' 46 U.S.C.A. §761.

* * * *

"Where this leaves us is that the alternative to our holding is to impose an unwieldy trifid system on recovery for maritime deaths.[i] If the death occurred within territorial waters, recovery could be had under the *Moragne* wrongful death - survival action. [ii] If the death occurred on the High Seas and the unwary pleader invoked the magical provisions of F.R. Civ. P. 9(h), or in the unlikely event that he could not obtain jurisdiction in any state court, full survival recovery

could be had under the decisional law-created federal maritime survival action but wrongful death recovery would be limited to DOHSA's pecuniary loss.' And [iii] the legal helmsman with a closer eye on the telltale-for the same death on the High Seas - could file his action at law and under substantive maritime principles would recover all that *Moragne* and *Gaudet* allow." (Footnotes omitted).

In summary, the decision of this Honorable Court in *Moragne v. Marine Lines, Inc.*, supra, clearly established a wrongful death action under the General Maritime Law. This action is available whether the death occurred within state territorial waters or upon the high seas. To argue that the new action created by Moragne cannot exist side by side with the previously existing action available under DOHSA fails to consider the fact that DOHSA has, for many years, existed side by side with the Jones Act, which also allows recovery for maritime wrongful death. Further, to limit the holding in Moragne to state territorial waters would necessarily create an entirely new set of "anomalies" to replace those Mr. Justice Harlan sought to remedy by his decision in *Moragne*.

In light of the foregoing, it is respectfully submitted that the decisions of this Court make it entirely clear that *Moragne* provides a wrongful death action on any navigable waters, be they state territorial waters or the high seas. Therefore, there is no requirement that a writ of certiorari issue to consider this point.

II.

As the argument advanced by petitioner in Section II of

of its application for writs does not concern any claim made by respondents herein, no response is required to this argument. It is, however, covered in the *Nation* brief.

III.

Petitioner also requests that this Honorable Court review the decision of both the trial court and the Court of Appeal in applying the doctrine of res ipsa loquitor to find petitioner liable to the survivors of the decedents, Higginbotham, Shinn and Nation. Petitioner asserts that the record did not contain sufficient evidence to maintain the application of this doctrine and further that the doctrine could not be properly applied only to Mobil and not to the other defendant, Bell, as well.

At the trial of the case, a substantial amount of evidence was presented by the various plaintiffs, including petitioner, which sought to show that the crash of the helicopter was due to a defect in its design, construction or manufacture. However, the district judge ruled that the evidence submitted by the plaintiffs was insufficient to hold the manufacturer liable. In fact, it was his finding that there was no evidence to show the specific cause of the crash. However, based upon the totality of the evidence presented, including evidence as to the maintenance schedule of Mobil, the flight record of Mobil helicopters, and the past flight history of the particular pilot in question, the court did find that the evidence was sufficient to support holding Mobil liable to the plaintiffs on the basis of res ipsa loquitor. This finding by the trial court was upheld by the Fifth Circuit on appeal.

The doctrine of res ipsa loquitor may be succinctly stated as follows:

> "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." Prosser, *Law of Torts*, 4th Edition, 1971, p. 214.

As can be seen from this statement, the doctrine of res ipsa loquitor essentially requires the occurrence of an act which would not ordinarily happen in the absence of negligence on the part of someone. Further, the defendant against whom the doctrine is invoked must have the exclusive control of the instrument which caused the injury.

Regarding the first requirement, the Fifth Circuit held that the current state of the art in aircraft design, construction, travel, technology, pilot training, etc. now supports the conclusion that aircraft crashes do not normally occur in the absence of negligence. As was stated by the Fifth Circuit in *Williams v. The United States*, 218 F.2d 473 (C.A. 5th Cir. 1955):

> "Res ipsa loquitor is a rule based upon human experience and its application to a particular situation must necessarily vary with human experience. A situation to which the doctrine was not applicable a half century ago because of insufficient experience or a lack of technical knowledge, might today fall within the scope of the rule, depending upon what experience has shown."

On this basis, the Fifth Circuit did not follow the holding in *Morrison v. LeTourneau Co.*, 138 F.2d 339. In *Morrison*, supra, the court had held that res ipsa loquitor could not apply because there was no showing that such accidents do not ordinarily happen even to the most skillful pilot in the finest type airplanes available in 1940. Without doubt, the aircraft industry had made many technological advances in the twenty-four years between the judgment in *Morrison* and the crash of the helicopter involved in the instant case. Thus, the Fifth Circuit's decision to apply res ipsa loquitor in this instance was clearly correct.

Further support of the application of res ipsa loquitor is supplied by the fact that Mobil was in exclusive control of the helicopter. The helicopter was subject to maintenance by employees of Mobil, Mobil pilots flew the helicopters and the helicopters were stored at Mobil facilities. Therefore, the second element of res ipsa loquitor, that is, the element of control, cannot be denied by petitioner.

That the doctrine was invoked against only one defendant is not a basis for granting the writ sought by petitioner. There was, of course, evidence presented which tended to show that the crash was due to the defective construction and design of the Bell Helicopter. However, this evidence was found insufficient to warrant holding Bell Liable by the district judge. Only after reaching this conclusion, did he then seek to apply res ipsa loquitor to the facts of this case. As stated in his opinion, "the doctrine of res ipsa loquitor in the light of the total effect of the evidence, affords a reasonable inference of fault and is properly applicable to the facts of this litigation." The facts relied on by the trial court included the maintenance record, the flight

records of Mobil helicopters, and of the record of the particular pilot in question. These facts were sufficient for the application of res ipsa loquitor by the trial judge. *Higginbotham vs. Mobil*, 357 F. Supp., at Page 1174.

Further, in order to apply res ipsa loquitor, a plaintiff is not required to exclude all other possible theories beyond a reasonable doubt. It is enough that he makes out a case from which the finder of fact may reasonably conclude that the negligence, more probably than not, was that of the defendant. Restatement (Second) of Torts, Section 328 (D) Comment Subsection (b). As stated by the trial court, the evidence taken as a whole supported the conclusion that res ipsa loquitor was properly applicable against Mobil but not against Bell. The evidence against Bell was merely insufficient to establish liability on its part on a products liability claim. This did not foreclose a finding of negligence against Mobil based on the doctrine of res ipsa loquitor.

Finally, as the Fifth Circuit noted in its opinion, (545 F. 2d at 431).

> "In any event, we may reverse the lower Court's finding of negligence only if we are convinced that it is clearly erroneous. See *Kennedy v. Henderschied*, 5th Cir. 1973, 490 F.2d 85. We are not left with the definite and firm conviction that Judge Scott erred in the inferences he drew from the circumstances of this case or in his conclusion that Mobil failed to rebut those inferences."

Respondents submit the facts relied upon by Judge Scott were a sufficient basis for the application of res ipsa loquitor to the instant case. In the absence of clear error on his part, the judgment of the Fifth Circuit properly affirmed the trial court's decision, and no basis for the granting of petitioner's writ thus appears in the record of this case.

CONCLUSION

In summary, respondents submit that petitioner's arguments relative to the application of *Moragne* to territorial waters only is simply not supported by the *Moragne* decision itself, the cases subsequent to *Moragne*, and leading authorities in the field. This point being settled against the position adopted by petitioner, there is no reason that a writ should issue from this court to review that point.

Finally, the application of the well established doctrine of res ipsa loquitor to the facts of the instant case, resulting in the imposition of liability against Mobil only, was clearly supported by the facts shown at the trial of the case and by the law made applicable to these facts through the many years of judicial experience.

Therefore, respondents respectfully urge that this Honorable Court decline to exercise its discretion in issuing a writ of certiorari as requested by petitioner, and let the judgment of the Fifth Circuit Court of Appeal stand as rendered on the issues presented herein.

Respectfully Submitted,

THOMPSON & SELLERS

Charles M. Thompson; Jr.
Post Office Box 308
Abbeville, Louisiana 70510
(318) 893-3107

Counsel for Francis Nell Higginbotham, et al.

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing has this date been forwarded to Mr. Carl J. Schumacher, Jr., Attorney for Defendant, Mobil Oil Corporation, 1106 Arabella Street, New Orleans, Louisiana 70115, and Mr. A.R. Christovich, Christovich & Kearney, 1815 American Bank Building, New Orleans, Louisiana by placing same in the United States mail postage prepaid and properly addressed.

Abbeville, Louisiana, this 8th day of September, 1977.

Charles M. Thompson, Jr.

Supreme Court, U. S.
FILED
SEP 10 1977
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76-1726

MOBIL OIL CORPORATION,

Petitioner

versus

FRANCIS NELL HIGGINBOTHAM, ADMINISTRATRIX OF THE ESTATE OF MARSHALL K. HIGGINBOTHAM, ET AL.

Respondent

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

KIERR, GAINSBURGH, BENJAMIN,
FALLON & LEWIS
Jack C. Benjamin
1718 First National Bank of
Commerce Building
New Orleans, Louisiana 70112

Counsel for Respondent
Mrs. Arline J. Shinn, Ind., et al.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 76 - 1726

MOBIL OIL CORPORATION,

Petitioner

versus

FRANCIS NELL HIGGINBOTHAM, ADMINISTRATRIX OF THE ESTATE OF MARSHALL K. HIGGINBOTHAM, ET AL.,

Respondent

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent, Mrs. Arline J. Shinn, adopts the Statement of the Case which appears in the Brief in Response to Petition for Writ of Certiorari filed on behalf of respondent, Francis Nell Higginbotham, et al.

STATEMENT OF ISSUES

Mobil Oil Corporation has petitioned this Court to exercise its supervisory jurisdiction in order to review the decision of the United States Court for Appeals for the Fifth Circuit in this cause, alleging three grounds:

1. A conflict exists between the First and

Fifth Circuits relating to the applicability of *Moragne* to wrongful deaths occurring on the high seas;

2. The Court of Appeals for the Fifth Circuit committed error in its application of Jones Act status to James Nation; and

3. The trial court and the Court of Appeals for the Fifth Circuit committed error in their application of the doctrine of *res ipsa loquitur.*

I.

ALLEGED CONFLICT BETWEEN THE CIRCUITS

Petitioner represents to this Court that the Writ should be issued because of an alleged conflict between the decision of the Fifth Circuit in this case and that of the United States Court of Appeals for the First Circuit in *Barbe v. Drummond*.[2] It is respectfully submitted that the alleged conflict between the First and Fifth Circuits is less apparent than represented.

A detailed analysis of the decision in *Barbe v. Drummond*[3] reveals that the apparent conflict represented by petitioner is contained in dictum and is directed to a principle which is dissimilar to that at issue in the case at bar. The First Circuit Court of Appeals in *Barbe* was faced with deciding whether recovery could be made for the conscious pain and suffering endured by the decedent in an action for

1. *Moragne v. States Marine Lines*, 398 U.S. 375, 26 L.Ed. 2d 339, 90 S.Ct. 1772 (1970).

2. *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974).

3. *Id.*

death occurring on the high seas.

In *Barbe*, suit was brought by the administrator of the estate of the decedent, Janet Barbe, who died due to exposure after the small motorboat on which she was a passenger sank on the high seas off of the coast of Massachusetts. The district judge before whom the case was tried awarded plaintiff $15,000 for decedent's conscious pain and suffering and an additional $1,500 for funeral expenses. Defendant-owner of the small craft appealed to the United States Court of Appeals for the First Circuit claiming that the trial judge committed error by awarding damages for conscious pain and suffering. Defendant-owner contended that this type of damage is precluded from the pecuniary loss standard of the Death on the High Seas Act[4] (hereinafter referred to as DOHSA) as well as under the General Maritime Law. The court, after briefly reviewing the jurisprudence interpreting the pecuniary loss standard of DOHSA concluded that conscious pain and suffering could not be recovered under that statute.

The court then turned to an examination of the General Maritime Law to determine whether under that body of law there could be recovery for conscious pain and suffering. Plaintiff had advanced three theories of recovery. The first was to adopt state law as surrogate federal law to supplement the General Maritime Law. As both plaintiff and defendant were residents of the State of Massachusetts, plaintiff argued, it is not inimical to the maritime law to adopt the law of the state of which the litigants are citizens to complement the General Maritime Law.[5] The court, however, chose not to travel that course because it would have

4. 46 U.S.C. §§ 761, *et seq.*

5. *The Hamilton*, 207 U.S. 398, 52 L.Ed. 264 (1907).

required the federal court to ascertain whether the "state survival statute was meant to apply to admiralty claims" and also "whether the concerned state has enacted a survival statute." [6]

The second theory advanced by plaintiff was to apply *Moragne v. States Marine Lines.*[7] The court declined to apply *Moragne* in this context. It is submitted that the First Circuit correctly rejected the application of *Moragne* in that case for *Moragne* created a cause of action for wrongful death and the issue before the First Circuit was whether a cause of action survived the decedent allowing recovery for the decedent's pain and suffering endured prior to death.

The third and final theory advanced by plaintiff, and the one adopted by the First Circuit, was that *Moragne* not only removed the bar of *The Harrisburg* [8] , which precluded the decedent's survivors' cause of action to recover the damages they suffered as a result of the death, but also that *Moragne* removed the prohibition against the survival action, the action of the decedent to recover for the damages he suffered as a result of the defendant's fault.

The First Circuit relied on the reasoning advanced by the Eighth Circuit Court of Appeals in *Spiller v. Thomas M. Lowe, Jr. & Associates.*[9] In *Spiller,* several employees of the defendant-vesselowner drowned when the boat in which they were riding capsized and sank on the Red River in Arkansas. The action was brought by the personal representa-

6. *Barbe v. Drummond, supra,* at 798.

7. *Supra.* note 1.

8. 119 U.S. 199, 30 L.Ed. 358 (1886).

9. 466 F.2d 903 (8th Cir. 1972).

tives of the decedents' estates and by their surviving wives, children and parents. Liability was predicated on negligence and the unseaworthiness of the vessel. The court found no evidence of gross negligence but did find that the vessel was unseaworthy. Accordingly, judgment in the amount of $455,000 for all beneficiaries was entered.

Included in the award was $15,000 for each of the decedent's estates as compensation for the pain and suffering each decedent suffered prior to his death. The decision of the trial court finding that there existed a survival action upon which the recompense for pain and suffering was made was questioned by defendant and appealed to the Eighth Circuit.

The Circuit Court analyzed the methodology employed by this Court in *Moragne.* The Eighth Circuit reasoned as this Court did in *Moragne* that, because there is no congressional prohibition against a survivor's action and because of the multiplicity of state survivors' actions, public policy is to permit such an action; therefore, the Court was willing to make that "small leap from the decision in *Moragne* to an acceptance of the survival of personal injury actions as an integral part of the general maritime law.' " [10]

In neither *Barbe* nor *Spiller* was the court squarely faced with deciding the issue whether the wrongful death action to recover the damages suffered and sustained by the decedent's beneficiaries is to be georgrahically limited to those deaths occurring within state territorial waters; in other

10. *Spiller v. Thomas M. Lowe, Jr. & Associates, supra* at 910, n. 9, quoting from *Marsh v. Buckeye Steamship Co.,* 33 F.Supp. 972, 974-975 (N.D. Ohio 1971).

words, neither court, with respect to the *Moragne* wrongful death action as opposed to the survivor's action, decided whether DOHSA was the sole and exclusive remedy for deaths occurring on the high seas.

Petitioner's reliance on the apparent conflict between *Barbe* and the instant case is misplaced. In support of its Petition for a Writ of Certiorari to the Fifth Circuit, petitioner compares the language used by the court in *Barbe* and in this case.[11] Respondent respectfully submits to this Honorable Court that dependence on the language petitioner relies upon in *Barbe* to support the granting of writs in this instance is inappropriate and misplaced for several cogent reasons.

First, the legal proposition at issue in *Barbe* was whether recovery could be made for the conscious pain and suffering of the decedent and for funeral expenses, that is, whether the decedent's cause of action survived and could be asserted by her beneficiaries. *The language relied on by petitioner is dictum directed to the Court's analysis whether decedent's estate could recover the funeral expenses incurred.* It is in this context that the quoted language must be viewed. It is, moreover, respectfully submitted that the recovery sought for funeral expenses was made for the estate and was part of the damages sought in the survival action, not as damages recoverable in a wrongful death action.

According to *Speiser*[12], it is noted that recovery of funeral expenses can be made under either the survival action or

11. Petition of Mobil Oil Corporation, et al., at 10-11.

12. *Recovery for Wrongful Death*, §§ 3:58, 14:6 (2d Ed. 1975).

the wrongful death action, depending on whether decedent's estate paid for the funeral or whether the decedent's survivors advanced the funeral expenses.

Respondent further directs the Court's attention to the fact that the issue before it and on which petitioner seeks to invokes this Court's jurisdiction is whether plaintiffs may recover damages for loss of society in a wrongful death action. The issues presented for review are clearly inapposite to those at issue in *Barbe*.

Second, the First Circuit analyzed the reason why some courts have been reticent to grant recovery for funeral expenses incurred:

> [S]ince the estate would be liable for funeral expenses had death occurred naturally, such expenses unlike lost earnings do not represent a pecuniary loss resulting from the tortious conduct and *their recovery would represent a windfall.*[13]

Thus, the rationale of the First Circuit to deny recovery of funeral expenses in the survival action was that the estate would, regardless of the tortious conduct, nevertheless be responsible for funeral expenses: the tortious conduct of defendant merely advanced the time of payment.[14]

It is respectfully submitted that *Barbe* and the present case are inapposite and consequently the grounds to invoke the supervisory jurisdiction of this Court are insufficient.

13. *Barbe v. Drummond, supra* at 802, emphasis supplied.

14. See also *S. Speiser, supra*, § 3:58 (Supp. Dec., 1976), who concludes that this was the basis for the First Circuit's denial of recovery for funeral expenses.

"We accordingly overrule *The Harrisburg*, and hold that an action does lie under *General Maritime Law* for death caused by violation of maritime duties." [15] This was the holding of this Court through Mr. Justice Harlan in *Moragne*, creating a new cause of action for wrongful death under the General Maritime Law. The succinct and unambiguous holding of this Court is unrestricted and contains no territorial or geographic boundaries. The cause of action for wrongful death runs in favor of the beneficiaries of decedents who lose their lives regardless of the location of the delict on the high seas or within the territorial waters of a state or nation.

The question presented for review is whether the Death on the High Seas Act [16] is the exclusive remedy for deaths occurring on the high seas. It is evident from the legislative history of DOHSA, its jurisprudential development, as well as from this Court's holding in *Moragne* and its interpretation in *Sealand Services v. Gaudet* [17] that the statute was never intended to be nor is the exclusive remedy for deaths occurring on the high seas.

That DOHSA evidences no intention on the part of Congress to make the Act the sole and exclusive remedy for deaths occurring on the high seas is clear from the legislative history and debates on the floor of the House concerning the Act. As originally proposed, Section 7 of the Act stated as follows:

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15. *Moragne v. States Marine Lines, supra at 361*, emphasis supplied.

16. 46 U.S.C.§§761, *et seq.*

17. 414 U.S. 573, 39 L.Ed. 2d 9, 94 S.Ct. 806 (1974).

> That the provisions of any state Statute giving or regulating rights of action or remedies for death shall not be affected by this Act as to causes of action accruing within the territorial limits of any State.[18]

The legislative debates on the Act demonstrate that one of the major concerns of Congress was that Section 7, as originally drafted, might restrict the rights of action and remedies afforded by state law to its citizens.[19] Congressman Mann of Illinois led opposition to Section 7 because of his concern that the legislation would abrogate a citizen's right to remedies extended to him by state law. He, therefore, successfully brought an amendment to the Act which deleted the last clause, leaving Section 7 of the Act to read as follows:

> That the provisions of any state Statute giving or regulating rights of action or remedies for death shall not be affected by this chapter.[20]

It has been held by this Court that it is not inimical to the interests of the Maritime Law to give extra territorial application to state laws in maritime causes of action. In *The Hamilton*, [21] the Court, through Mr. Justice Holmes, unequivocally held that state law in an action for wrongful death between citizens of the same state could be utilized by the claimant as a means of recovery for wrongful death. The passage of DOHSA, as amended, did not in any way restrict, limit or affect the holding of this Court in that case.

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18. 59 Cong. Rec. 4480 (1920).
19. *Id.* at 4484.
20. 46 U.S.C. § 761.
21. *Supra* note 5.

Since the enactment of both DOHSA and the Jones Act[22], the courts have not interpreted either act to be the exclusive remedy to recover for the death of a seaman on the high seas. In *Doyle v. Albatross Tanker Corp.*[23], the court, faced with deciding whether the Jones Act and DOHSA were exclusive remedies, answered in the negative.

> There is not a whisper in the text of the Jones Act or its legislative history to indicate that, with respect to seamen in the special area covered by the Death on the High Seas Act, Congress intended the Jones Act to supersede the Death on the High Seas Act . . . .Moreover,. . . it appears to be the settled law of the lower federal courts, expressed in numerous cases, that both statutory remedies may be availed of for the purpose of recovering damages for the wrongful deaths of seamen caused by occurrences on the high seas, and that the action in admiralty created by the Death on the High Seas Act may be pursued by the personal representative of a deceased sailor as well as the action at law provided for in the Jones Act.[24]

It has been held, also, that DOHSA affords a remedy for an additional class of beneficiaries to that of the Jones Act, and the acts complement each other.[25]

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22. 46 U.S.C.§ 688.

23. 367 F.2d 465 (2d Cir. 1966).

24. *Id.*at 466-467; see also *Petition of Risdal & Anderson,Inc.*, 291 F.Supp. 353 (D. Mass. 1968); *Peace v. Fidalgo Island Packing Co.*, 419 F.2d 371 (9th Cir. 1969); G. Gilmore and C. Black, Jr., *The Law of Admiralty*,§ 6-31 at 364 (2d Ed. 1975).

25. *The Four Sisters*, 75 F.Supp. 399 (D. Mass. 1947).

Petitioner's position that DOHSA is the exclusive remedy for deaths occurring on the high seas and that decisional law, *Moragne*, cannot supplement the congressional act is untenable, particularly when one considers that the courts in the past have delicately woven together the rights and remedies afforded to seamen by statutes as well as decisional law. The *Jones Act*[26] was enacted by Congress to overcome the fellow servant doctrine, thus affording a seaman a cause of action for negligence against his employer. It is elementary in admiralty law that the Jones Act is not the sole and exclusive remedy afforded to seamen; a seaman has at his disposal the additional remedy of unseaworthiness which has been created by decisional law. The proposition advanced by petitioner in this cause would have the Court ignore this interrelationship of statutory and decisional remedies created for the benefit of injured seamen. As the unseaworthiness remedy supplements the negligence remedy extended by the Jones Act, the judge-made remedy for wrongful death similarly complements and supplements the statutory remedy created for deaths occurring on the high seas, DOHSA.

In creating the wrongful death remedy, in *Moragne*, Justice Harlan analyzed the effect of wrongful death legislation enacted by the states as well as the United States Congress. Legislation, he stated, plays a broader role than the limited parameters drawn by enactments of the legislative body.

> It has always been the duty of a common-law court to perceive the impact of major legislative innovations and to interweave the new legislative

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26. 46 U.S.C.§ 688.

> policies with the inherited body of common-law principles-- many of them deriving from earlier legislative exertions.[27]

What is often considered the common law finds its fountainhead in legislative enactments.[28] As every state has enacted wrongful death legislation, and as Congress has permitted recovery for wrongful death, the heretofore existing public policy against recovery for wrongful death has been abrogated; rather, the public policy is to favor recovery for the wrongful death of an individual.[29]

> Where death is caused by the breach of a duty imposed by Federal Maritime Law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases.[30]

Prior to *Moragne*, the rules of law which had evolved concerning the rights and remedies for wrongful deaths occurring on the high seas and in state territorial waters created three anomalies which the Court recognized as inequitable.

> [First] within the territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured, but frequently not if he is killed.

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27. *Moragne v. States Marine Lines, supra* at 352.

28. *Id.*, quoting from Landis, "Statutes and the Sources of Law," *Harvard Legal Essays*, 213 214 (1934).

29. *Id. at 361.*

30. *Id.*

> [Second] identical breaches of the duty to provide a seaworthy ship, resulting in death, produce liability outside the three mile limit . . . but not within the territorial waters of a State when a local statute excludes unseaworthiness claims.
>
> [Third] a true seaman -- that is, a member of a ship's company, covered by the Jones Act--is provided no remedy for death caused by unseaworthiness within territorial waters while a longshoreman to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, does have such a remedy when allowed by a state statute.[31]

These anomalies recognized by the Court have destroyed the constitutionally mandated uniformity of the maritime law.

> Our recognization of a right to recover for wrongful death under General Maritime Law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. [Citations omitted.] Such uniformity not only will further the concerns of both of the 1920 Acts [The Death on the High Seas Act and The Jones Act] but also will give effect to the constitutionally based principle that Federal Admiralty Law would be a 'system of law co-extensive with, and operating uniformly in, the whole country.'[32]

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31. *Id.* at 353-354.

32. *Id.* at 350.

The anomalies created by the territorial distinctions noted by the Court in *Moragne* would be perpetuated and possibly even new anomalies may be created if the *Moragne* cause of action for wrongful death is to be geographically limited to those deaths occurring on territorial waters.[33]

As noted by Judge John R. Brown in *Law v. Sea Drilling Corp.*[34], a multifacted system is created by geographically limiting *Moragne* to state territorial waters:

> Where this leaves us in that the alternative to our holding is to impose an unwieldy trifid system on recovery for maritime deaths. [i] If the death occurred within territorial waters, recovery could be had under the Moragne wrongful death-survival action. [ii] If the death occurred on the High Seas and the unwary pleader invoked the magical provisions of F.R. Civ. P. 9(h), or in the unlikely event that he could not obtain jurisdiction in any state court, full survival recovery could be had under the decision law-created federal maritime survival action but wrongful death recovery would be limited to DOHSA's 'pecuniary loss.' And [iii] the legal helmsman with a closer eye on the telltale -- for the same death on the High Seas-- could file his action at law and under substantive maritime princples would recover all that Moragne and Gaudet allow.

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33. See 2 *Benedict on Admiralty* § 84, 7-37 (7th Ed. 1975); for example, the rule of *The Hamilton, supra* note 5, would presumably be viable permitting actions to be brought under state law for wrongful death where the claimant and defendant are citizens of the same state.

34. 523 F.2d 793 (5th Cir. 1975).

To limit the scope of *Moragne* would limit elements of recovery depending on the fortuitous location of the death; *Gaudet* damages for loss of society and services would be permitted for deaths occurring on territorial waters but the decedent's heirs would be precluded from that recovery for deaths occurring on the high seas. Why should elements of damages depend upon the location of the delict, particularly when a uniform body of federal law should apply? Should the rights of claimants be any more or less when tortious conduct is committed on the high seas rather than in territorial waters? Respondent respectfully submits that to geographically restrict the *Moragne* cause of action would be an arbitrary and capricious limitation which contravenes the admiralty's "special solicitude for the welfare of those men who [undertake] to venture upon hazardous and unpredictable sea voyages" and contradicts the rule of the "humane and liberal character of proceedings in admiralty to give than to withhold the remedy. . ."[35]

This Court in *Gaudet* took an expansive view of the *Moragne* cause of action holding that the recovery for wrongful death is not limited by state or federal legislation or decisional law interpreting these statutes. As stated by Gilmore and Black:

> Thus, Gaudet, if it is to be taken as representing the settled view of the majority of the Supreme Court, amply confirms our comment (written before Gaudet had been decided) that the Moragne case had 'reduced both DOHSA and the FELA death provisions incorporated in the Jones Act to the level of nonstatutory Restatements.'

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35. *Morngne v. State Marine Lines, supra* at 349.

> Under Gaudet, indeed, all the state statutes seem to have joined the federal statutes on the scrap heap.[36]

Most courts since the *Moragne* decision have recognized that the cause of action created by that case has no geographic limitations. In *Sennett v. Shell Oil Co.*[37], a case in which plaintiff was killed on the high seas, the district judge analyzed the *Moragne* decision and concluded that Congress, by enacting DOHSA, did not intend to place a limitation on recovery for maritime wrongful death. "As *Moragne* pointed out, the policy implicit in the state and federal wrongful death statutes indicates that recovery for maritime death should be permitted absent 'a legislative direction to except a particular class of cases.' [Citations omitted.] Congress has not so directed. The Death on the High Seas Act is not an exclusive remedy for those whose relatives perish wrongfully one marine league from shore."[38]

Maritime law is regulated not only by statute but also by decisional law. As this Court in *Fitzgerald v. United States Lines Co.*[39] stated:

> Article III of the Constitution vested in the federal courts jurisdiction over admiralty and mari-

36. Gilmore and Black, *supra* at 369-370.

37. 325 F.Supp. 1 (E.D. La. 1971).

38. *Id.* at 7; see also *Nye v. A/S D/S Svendborg*, 358 F. Supp. 145 (S.D. N.Y. 1973); *Estate of Kauzlarich v. Exxon Co., USA*, 405 F. Supp. 332 (D. S.C. 1975); *Hammil v. Olympic Airways, S.A.*, 398 F. Supp. 829 (D.C. D.C. 1975).

39. 374 U.S. 16, 10 L.Ed. 2d 720, 83 S.Ct. 1646 (1963).

> time cases, and, since that time, the Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law. This Court has long recognized its power and responsibility in this area and has exercised that power where necessary to do so.[40]

The position advanced by petitioner in this cause would have this Court abdicate its long-standing policy to fashion the rules of the General Maritime Law and weave those elements compatibly with those of statutory rules into a flexible fabric which constitutes our admiralty law. It is respectfully submitted that it was within the power and authority of this Court to create the wrongful death remedy in *Moragne* and it does not contravene any legislative purpose to give to that decisional remedy application to an area heretofore governed solely by statute.

II.

SEAMAN'S STATUS OF MR. NATION

Petitioner further contends to this Honorable Court that the decision of the Fifth Circuit granting Jones Act status to James Nation is without merit and should be reversed. The Court, in holding that Mr. Nation was a Jones Act seaman and was entitled to bring an action under the Jones Act against his employer, analyzed Mr. Nation's work history and reasoned that over the two years prior to his death he performed a substantial amount of his work aboard vessels and that his assignment to the fixed platform was fortuitous and of a temporary nature. To deny Mr. Nation Jones Act

41. *Id.* at 10 L.Ed. 2d 724.

status solely because of the work assignment at the time of his death would ignore the primary function and purpose he served as an employee of Mobil.

Petitioner would suggest to this Honorable Court that the approach of the Fifth Circuit in affording Jones Act status to Mr. Nation is a novel and new approach fraught with perplexing and unsolvable problems. To the contrary. The approach taken by the Court in affording Jones Act status to Mr. Nation is neither novel nor unworkable. It merely represents the application of principles which recently evolved in the jurisprudential development of the Jones Act in the Fifth Circuit.

In particular, respondent respectfully submits that the approach taken by the Fifth Circuit to analyze the claimant's work history is one utilized in *Holland v. Allied Structural Steel Co.*[41] In that case, the court reversed the jury's determination that the decedent, a structural steel worker, was a seaman within the purview of the Jones Act. The court found that the decedent's contact with vessels was intermittent and stated that in analyzing seamen's status under the Jones Act the court must focus "on an employee's principal duties, the time spent aboard or in the service of a vessel, and the relation of his injury to his vessel-related activities."[42]

Respondent further respectfully submits that the issues of Jones Act status in this cause is the transposition of that

41. 539 F.2d 476 (5th Cir. 1976).

42. *Id.* at 479.

at issue in *Brown v. ITT Rayonier*,[43] wherein the claimant, seeking to recover damages for injuries sustained while riding in a motorboat in order to obtain water samples for his employer, was denied Jones Act status. Though the plaintiff in that cause was found to be aiding in the function or mission of the vessel and though the vessel was in navigation, the court found that he was a "casual worker on the water" whose work on the vessel was incidental to his shore-based employment.[44] As Mr. Brown was denied Jones Act status because of his intermittent contact with the vessels, Mr. Nation should not be denied Jones Act status because of his intermittent and transient contact with a fixed stationary platform. To do so would contravene the admiralty's humane and liberal policy to give rather than withhold a remedy.

III.

RES IPSA LOQUITUR

Petitioner finally seeks review of the decision in this cause assessing liability against it by the application of the doctrine of res ipsa loquitur. The elements of that legal principle are perhaps best defined in Section 328D, Restatement of Torts (Second):

> (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
>
> (a) The event is of a kind which ordinarily does not occur in the absence of negligence;

43. 497 F.2d 234 (5th Cir. 1974)

44. *Id* at 238.

(b) Other responsible causes including the conduct of the plaintiff and third persons are sufficiently eliminated by the evidence; and

(c) The indicated negligence is within the scope of the defendant's duty to the plaintiff.

This doctrine permits the trier of fact to infer from the facts presented that the delict was caused by the defendant's fault; in other words, the act would not ordinarily have happened in the absence of fault on the part of someone. The party invoking the rule need not exclude any other possibilities of the cause of the accident; it is sufficient to prove facts from which the trier of fact may reasonably conclude that the fault was more probably than not that of the defendant. *Sweeney v. Erving.*[45]

That the doctrine applies in admiralty is unquestioned. *Johnson v. United States.*[46]

The state of the art of aircraft technology, design, and training permits the application of res ipsa loquitur to aircraft cases. *Cox v. Northwest Airlines.*[47] In *Williams v. United States*[48] the Fifth Circuit stated:

> Res ipsa loquitur is a rule based upon human experience and its application to a particular situation must necessarily vary with human experience. A situation to which the doctrine was not applicable a half century ago because of insuf-

45. 228 U.S. 233, 57 L.Ed. 815, 33 S.Ct. 416 (1913).

46. 333 U.S. 46, 92 L.Ed. 468, 68 S.Ct. 391 (1948).

47. 397 F.2d 893 (7th Cir. 1967).

48. 218 F.2d 473 (5th Cir. 1955).

> ficient experience or a lack of technical knowledge, might today fall within the scope of the rule, depending upon what experience is shown.[49]

The Fifth Circuit in this case relied on the opinions in *Colditz v. Eastern Airlines,*[50] *White v. Transworld Airlines,*[51] and *Mobil Chemical Co. v. Bell,*[52] all of which involved issues substantially similar to those in this matter. In those cases, the courts sustained the application of the res ipsa loquitur rule because the circumstances of the accident raised the inference that the accident would not have occurred but for the negligence of the defendant.

The second requirement of the rule is that the instrument causing harm be within the exclusive control of the defendant. The helicopter in question was maintained by employees of Mobil, housed at Mobil facilities and flown by Mobil pilots. On the fatal day the pilot of the helicopter was a Mobil employee. That the instrumentality causing the deaths in this case was in the exclusive control of Mobil cannot be denied.

Finally, in affirming the judgment of the district court, the Fifth Circuit found that the decision of the trial court was not clearly erroneous. The district judge was able to evaluate the testimony of the live witnesses and in the absence of clear error, the judgment was properly affirmed.[53]

49. *Id.* at 476.

50. 329 F.Supp. 691 (S.D.N.Y. 1971).

51. 320 F.Supp. 655 (S.D. N.Y. 1970).

52. *Mobil Chemical Co. v. Bell,* 517 S.W. 2d 245 (Tex. 1974).

53. *McAllister v. United States.* 348 U.S. 19, 99 L.Ed. 20, 75 S.Ct. 6 (1954)

CONCLUSION

In summary, respondent submits that petitioner's grounds for this Court's review of the application of the Federal Maritime Law to deaths occurring on the high seas is unsupported by the *Moragne* decision and its progeny. The alleged conflict between the First and Fifth Circuits does not exist as the cases relied on by petitioner are inapposite.

Furthermore, the decision of the Fifth Circuit to afford Mr. Nation a Jones Act remedy is in line with the jurisprudence interpreting the Jones Act. There is an invalid basis advanced by petitioner to grant a writ on that issue.

Finally, the Court's application of the res ipsa loquitur doctrine is clearly supported by the evidence and the facts. Absent a finding that the trial court's evaluation of the evidence and the applicable law is clearly erroneous there are insufficient grounds to grant a writ to review that issue.

Accordingly, respondent respectfully urges that this Court exercise its discretion and deny the Writ of Certiorari requested by petitioner.

Respectfully submitted,

KIERR, GAINSBURGH, BENJAMIN,
FALLON & LEWIS

By: _____

Jack C. Benjamin
1718 First National Bank of
Commerce Building
New Orleans, Louisiana
504-522-2304

Attorneys for Mrs. Arline J.
Shinn, Ind., et al.

CERTIFICATE OF SERVICE

The undersigned counsel for respondent has caused three copies of the foregoing Brief in Response to Petition for Writ of Certiorari to be served on Carl J. Schumacher, Jr., 1106 Arabella Street, New Orleans, Louisiana 70115; Jack Caldwell, 519 Main Street, Post Office Box 592, Franklin, Louisiana 70538; Messrs. Christovich & Kearney, American Bank Building, New Orleans, Louisiana 70130; Messrs. Thompson and Sellers, Post Office Box 308, 112 South Louisiana Avenue, Abbeville, Louisiana 70510; and I.P. Saal, Jr., Post Office Box 176, Gueydan, Louisiana, by placing same in the United States mail, postage prepaid, this 9th day of September, 1977.

_____
Jack C. Benjamin

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76-1726

MOBIL OIL CORPORATION, ET AL.,
Petitioner

versus

MRS. FRANCES NELL HIGGINBOTHAM, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR PETITIONER

CARL J. SCHUMACHER, JR.
1106 Arabella Street
New Orleans, La. 70115
(504) 899-8904

E. D. VICKERY
3710 One Shell Plaza
Houston, Texas 77002
(713) 224-8380
Attorneys for Petitioner,
Mobil Oil Corporation

OF COUNSEL:
CHARLES C. GRAY
P. O. Box 900
Dallas, Texas 75221
(214) 658-3348

ROYSTON, RAYZOR,
VICKERY & WILLIAMS
3710 One Shell Plaza
Houston, Texas 77002
(713) 224-8380

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 76 - 1726

MOBIL OIL CORPORATION, et al.,
Petitioner

versus

MRS. FRANCES NELL HIGGINBOTHAM, et al.,
Respondents

On Writ of Certiorari to The United States Court of Appeals
For the Fifth Circuit

BRIEF FOR PETITIONER

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals below is reported *sub nom., Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422 (5th Cir. 1977) and is dated January 13, 1977.* The district court's initial opinion (App. Cert. A-1) is reported under the same style at 357 F.Supp. 1164 (W.D. La. 1973) and is dated April 25, 1973; while the second opinion (App. Cert. A-32), which deals with the issue of damages, is reported at 360 F.Supp. 1140 (W.D. La. 1973) and is dated June 25, 1973.

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* The opinions below are printed in the Appendix to the Petition for a Writ of Certiorari in this case and have not been reprinted, Rule 36, as supplemented, Rules of the Supreme Court. The court of appeals' opinion below occurs as Appendix C of that Appendix, hereinafter referred to as App. Cert., p. A-54.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1970).

The judgment of the court of appeals (App. Cert. A-54) is dated January 13, 1977. An order of the court of appeals denying Petitioner's motion for rehearing and suggestion for rehearing en banc (App. Cert. A-94), is dated March 7, 1977. The Petition for writ of certiorari was filed on June 6, 1977 and was granted on October 3, 1977.

QUESTION PRESENTED

Whether in overruling *The Harrisburg* [1] and creating a maritime cause of action for death occurring within state territorial waters in *Moragne,* [2] this Court also completely replaced the statutory cause of action for death mandated by Congress as to deaths occurring within the geographical scope of the Death on the High Seas Act?

STATUTES INVOLVED

The relevant portions of The Death on the High Seas Act, hereinafter referred to as DOHSA, as amended are as follows, 46 U.S.C. § 761 (1970), 41 Stat. 537:

> *Whenever the death* of a person shall be caused by wrongful act, neglect, or default occurring on the high seas *beyond a marine league from the shore*

1. 119 U.S. 199 (1886).
2. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) (hereinafter referred to as *Moragne*).

> of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, . . . against the vessel, person, or corporation which would have been liable if death had not ensued. (emphasis supplied).

46 U.S.C. § 762 (1970), 41 Stat. 537:

> The recovery in such suit shall be a fair and just compensation for *the pecuniary loss* sustained by the persons for whose benefit the suit is brought. (emphasis supplied).

STATEMENT OF THE CASE

Petitioner, Mobil Oil Corp. (hereinafter referred to as Mobil), owned a helicopter which was used in its oil and gas drilling operations offshore Louisiana. On August 15, 1967, the aircraft landed on a fixed platform approximately 100 miles off the Louisiana coast in the Gulf of Mexico for the purpose of deplaning several workers and picking up others.[3] The helicopter disappeared within the geographic area covered by the Death on the High Seas Act[4] shortly after take-off with only a few parts of the aircraft being found. [5] Three passengers and the pilot of the aircraft died in the casualty. One of the passengers (Marshall Higginbotham) was an employee of Baxter Drilling Company, while the other two passengers (James Shinn and James Nation) were in the employ of Mobil and were judicially determined to

3. A. 4,5.
4. 46 U.S.C. § 761 *et seq.* (1970) (hereinafter referred to as "DOHSA."
5. A. 3.

be seamen.[6]

Litigation was commenced in a non-jury action in the district court against Mobil and Bell Helicopter Co., the manufacturer of the helicopter (hereinafter referred to as Bell Helicopter), seeking damages for the deaths based on the general maritime law as enunciated by this Court in *Moragne* and *Gaudet*,[7] as well as two federal statutes, the Jones Act[8] and DOHSA. The district court dismissed Bell Helicopter but found Mobil negligent.

The court of appeals below has held that the beneficiaries of these three men are entitled to recover death damages from Mobil as follows:

1. Higginbotham, not an employee of Mobil:

   (a) As provided by Congress under DOHSA for their pecuniary losses.

   (b) Under the general maritime law of *Moragne* and *Gaudet*, for their non-pecuniary damages.

2. Shinn and Nation, seaman employees of Mobil:[9]

   (a) As provided by Congress under the Jones Act for their pecuniary losses.

   (b) Under the general maritime law of *Moragne* and *Gaudet* for their non-pecuniary damages.

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6. App. Cert. 80
7. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974) (hereinafter referred to as *Gaudet*.)
8. 46 U.S.C. §688 (1970).
9. While Mobil does not agree with the conclusion of the court below that Nation was a seaman for the reasons set out in its Petition for Writ of Certiorari, pages 13-19, since the Writ was not granted on this issue, Mobil must accept it for the purposes of this case.

This was the result in the court of appeals below as to the non-pecuniary damages only because an earlier panel of that court had so held in *Law v. Sea Drilling Co.*, 510 F 2d 242, *reh. denied, modified in part*, 523 F.2d 793 (5th Cir. 1975) (hereinafter referred to as *Law*). The members of the panel indicated that they agreed with the decision of the First Circuit in *Barbe*[10] in reading *Moragne* to state that DOHSA is the exclusive wrongful death remedy outside of state territorial waters, yet the panel concluded that this issue was foreclosed by the decision of the *Law* panel.[11]

In *Moragne*, this Court overruled *The Harrisburg*[12] and created a cause of action for wrongful death damages caused by the breach by a shipowner of its duty to provide a seaworthy vessel under the general maritime law. It did so because within the territorial waters of the several states, death remedies for unseaworthiness were available only if the wrongful death statutes of the state had been interpreted to permit it.[13] In so doing this Court provided for the first time a uniform remedy for deaths occurring within the territorial waters of the several states.

It was not until *Gaudet*, however, that this Court determined the items of damages which would be recoverable under the new cause of action for wrongful death under the

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10. Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974).
11. The court below stated:
    "The members of the panel would read *Moragne* to say that DOHSA is the exclusive *wrongful death* remedy outside of state territorial waters. The decision in *Law*, however, forecloses this issue for the panel." (App. Cert. A-86, n. 19) Since *Law* foreclosed the issue for the panel below, it did not discuss it. Therefore it is the *Law* opinions with which we must deal in this Court.
12. 119 U.S. 199 (1886).
13. For example, in Texas such actions were permitted, but as *Moragne* demonstrates, they were not permitted in Florida.

general maritime law within the territorial waters of the several states. The items of damages held recoverable were:

1. Pecuniary items:

   (a) Loss of support.[14]
   (b) Loss of services.[15]

2. Non-pecuniary items:

   (a) Loss of society.[16]
   (b) Funeral expenses.[17]

Outside the territorial waters of the several states, a cause of action for wrongful death damages caused by the breach of a shipowner's maritime duty to provide a seaworthy vessel already existed at the time of the *Moragne-Gaudet* decisions, having been created by Congress when it passed DOHSA in 1920. The issue presented here arises because the court of appeals below in *Law* recognized it could award damages for the non-pecuniary damage item of loss of society only if it replaced the Congressional DOHSA remedy with this Court's *Moragne-Gaudet* remedy.[18] In the picturesque style which characterizes his opinions, Chief Judge Brown as the organ of the Court below in *Law* openly acknowledged that the court intended to do just that:

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14. These items are set out in Footnote 19, original opinion of the court below in *Law*, 510 F.2d at 249 as Items (1) through (4) and are repeated in Footnote 3 of the court's opinion on rehearing, 523 F. 2d at 794.
15. *Id.* Item (8).
16. *Id.* Item (6).
17. *Id.* Item (5).
18. It is undisputed that the non-pecuniary wrongful death damage item for loss of society is not recoverable under DOHSA or the Jones Act because of the limitation of the damages under those two statutes to pecuniary losses only.

> It is time that the dead hand of *The Harrisburg*--whether in the courts or on the elbow of the congressional draftsmen of DOHSA--follow the rest of the hulk to an honorable rest in the briney (sic) deep.
>
> No longer does one need a state remedy. No longer does one need . . . DOHSA as a remedy. 523 F.2d at 798.[19]

Perhaps the question presented could be more picturesquely stated:

> Does this Court have the power to consign DOHSA completely to the briny deep or to the scrap heap in order to award non-pecuniary death damages not authorized by Congress in the statute?

Petitioner respectfully submits the Court has no such power.[20]

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19. Earlier in its opinion, the court below quoted with approval the text writers' similar views:
> Thus *Gaudet* . . .amply confirms our comment (written before *Gaudet* had been decided) that the *Moragne* case had "reduced both DOHSA and the FELA death provisions incorporated in the Jones Act to the level of nonstatutory Restatements." *Under Gaudet, indeed, all the state statutes seem to have joined the federal statutes on the scrap heap.* The maritime law death remedy, as explicated in *Gaudet*, is now more comprehensive and provides for a greater recovery than had previously been available under the federal death statutes or under most state death statutes. (Emphasis supplied). 523 F.2d at 796 [Quoting Gilmore & Black, The Law of Admiralty 369-70 (2d Ed. 1975)].

20. That this Court has such power as to state statutes insofar as the admiralty and maritime law is concerned is equally clear.

ARGUMENT

I. *Background*

The Court in *The Harrisburg*, 119 U.S. 199 (1886) held that the general maritime law did not afford a cause of action for wrongful death. The Congress thereafter in 1920 enacted two maritime remedial statutes:

1. The Death on the High Seas Act--to provide a remedy for wrongful deaths on the high seas (outside the three mile territorial waters of the states) based on the general maritime law of negligence or unseaworthiness.[21]

2. Jones Act--by incorporating the terms of the Federal Employers' Liability Act, granted seamen and their survivors a right of action against the employer for injury or death based solely upon negligence.[22]

DOHSA specifically provided that "the recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought,"[23] and the Jones Act along with DOHSA, has been uniformly interpreted to permit recoveries of the same pe-

21. This statute permits not only recoveries based upon "neglect", but also on the unseaworthiness of the vessel under the maritime law. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 396 n.12; (1970) In Re Dearborn Marine Service, Inc., 499 F.2d 263, 270, n. 10 (5th Cir. 1974); Doyle v. Albatross Tanker Corp., 367 F.2d 465, 468 (2nd Cir. 1966).
22. 46 U.S.C. §688 (1970) (Jones Act) incorporated by reference the FELA, 45 U.S.C. §51, *et seq.* (1970).
23. 46 U.S.C. § 762 (1970).

cuniary losses only.[24] More specifically, since loss of society is a non-pecuniary item of damages, it is not a recoverable item under either statute.[25]

The legislative history of DOHSA consists principally of the debate upon the floor of the House of Representatives. A review of the debate is instructive since it demonstrates that the Congressional intent was (1) to utilize the statute for the purpose of establishing a uniformity of remedies involving maritime deaths occurring one marine league (three nautical miles) from the shore of the United States,[26] (2) to

24. The following decisions support the proposition that the actual pecuniary loss to the survivors is the correct measure of damages. Decisions under the Jones Act: Michigan C.R. Co. v. Vreeland, 227 U.S. 59, 68 (1913) (FELA); Davis v. Parkhill-Goodloe Co., 302 F.2d 489, 494 (5th Cir. 1962); Mpliris v. Hellenic Lines,Ltd., 323 F. Supp. 865, 895 (S.D. Tex. 1970), *aff'd mem.*, 440 F.2d 1163 (5th Cir. 1971); Petition of Risdal & Anderson, Inc., 291 F.Supp. 353, 357 (D. Mass. 1968). Decisions under the Death on the High Seas Act: Petition of United States, 418 F.2d 264, 272 (1st Cir. 1969); First Nat'l Bank in Greenwich v. National Airlines, Inc., 288 F.2d 621, 624 (2d Cir.), *cert. denied*, 368 U.S. 859 (1961). In Re Farrell Lines, Inc., 339 F. Supp. 91, 95 (E.D. La. 1971). Decisions under post-*Gaudet* general maritime law: Complaint ofCambria S.S. Co., 505 F.2d 517, 522 (6th Cir. 1974), *cert. denied*, 420 U.S. 975 (1975). This point becomes significant due to the *Gaudet* decision permitting dependent survivors to recover for the non-pecuniary item denominated as loss of society.
25. Loss of society is not permitted as a monetary loss under either the Jones Act or the Death on the High Seas Act. Jones Act: Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 266 (2d Cir. 1963), *cert cenied*, 376 U.S. 949 (1964); Savard v. Marine Contracting, Inc., 296 F.Supp. 1171, 1176 (D. Conn. 1969), *aff'd*, 471 F.2d 536 (2d Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). Death on the High Seas Act :First Nat'l Bank in Greenwich v. National Airlines,Inc., 288 F. 2d 621, 624 (2d Cir.), *cert. denied*, 368 U.S. 859 (1961); Green v. Ross, 338 F.Supp. 365, 367 (S.D. Fla. 1972), *aff'd*, 481 F.2d 102 (5th Cir.), *cert. denied*, 414 U.S. 1068 (1973); Valitutto v. D/S I/D Garonne, 295 F.Supp. 764, 765-6 (S.D. N.Y. 1969).
26. "MR. MOORE of Virginia. Is not the justification for section 7 found in the fact that some of the States under the State statutes take jurisdiction of causes of this character where even death may have occurred on the high seas, and that, therefore, you want to preserve that status and not interfere with it?

permit the particular law of the adjoining state to be applied within its three mile territorial waters due to congressional abstention, [27] and (3) to provide through statutory means an exclusive remedy for those deaths occurring within its

(Footnote 26 continued)

"MR. VOLSTEAD. No. If the gentleman will excuse me, my understanding is that the object of the act is to make a uniform rule for everything outside of the 3-mile limit." 59 Cong. Record 4482.

"MR. CULLEN. Then the purpose of that is to make the law uniform? Is that the object of it?

"MR. IGOE. The law is to remain as it is now, where there is a cause of action given by any State law or the decisions of the courts of those States for accidents in waters that are subject to the jurisdiction of those States. And then beyond that the State law does not apply, but this cause of actioin does apply." 59 Cong. Record 4483.

27. "MR. CONNALLY. Under the terms of section 7 what would be the effect of the bill as to a vessel, say, in the Mississippi River?

"MR. VOLSTEAD. It would be excluded from the operation of this law and be subject to the State laws as they are now." 59 Cong. Record 4483.

"MR. VOLSTEAD. Section 1 expressly provides that it shall apply to the high seas outside the 3-mile limit. Section 7 seeks to make certain that any action that originate: inside of the 3-mile limit, the Great Lakes, or in the Canal Zone is not to be covered by this act." 59 Cong. Record 4482. *Note also* Greene v. Vantage S.S.Corp., 466 F. 2d 159, 167-8 (4th Cir. 1972) which commented upon the legislative history of DOHSA in the following manner:

> In enacting DOHSA, Congress specifically declined to extend its coverage to territorial waters. More significantly, however, Congress permitted the states to provide remedies for wrongful death on territorial waters which were not only diverse, but which in many instances permitted more liberal recovery than the recovery provided under DOHSA. This seems to negate any suggestion that Congress intended to have a uniform remedy or that it opposed the existence of remedies on territorial waters which differed from those provided for death on the high seas.

geographical area.[28]

During the years following 1920, there were judicial accommodations reached between the two statutes, as well as with the laws of the adjoining states. As this Court recognized in *Moragne*,[29] this Court first held in 1930 that the Jones Act was a seaman's exclusive remedy for wrongful death based on negligence and even precluded resort to state wrongful death acts for deaths within a state's territorial waters which afforded a remedy based on unseaworthiness under the general maritime law to non-seamen.[30] As recently as 1964, the Court reaffirmed this holding in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), and affirmatively stated:

28. "MR. MONTAGUE. May I suggest–"

"MR. MONTAGUE. In reply to the statement of my colleague [Mr. Moore] I will say that jurisdiction upon this subject is found in the Constitution of the United States, and it has been held over and over again by our courts that *when the Congress legislates in pursuance of constitutional authority such a law is exclusive.* It requires no asservation (sic) in the bill to make it exclusive. It is exclusive by virtue of its superior jurisdiction; therefore, I submit, it is needless to amend this bill now and raise the chance of its defeat by adding a mere adjective when by the very force of the Constitution and the law in pursuance thereof it is inherently and necessarily exclusive. (emphasis supplied)

"MR. VOLSTEAD. My impression is it would be exclusive upon the theory the gentleman [Mr. Montague] suggests." 59 Cong. Record 4483. The Court of Appeals below in Dore v. Link Belt Co., 391 F. 2d 671, 675 (5th Cir. 1968) stated "[t]he legislative history indicates that when Congress passed the Death on the High Seas Act it intended the remedy it provided to be the exclusive one." This Court reversed the holding not upon the exclusive remedy provision of the statute, but on the basis that as between another competing federal statute, the Lands Act, DOHSA did not apply to a stationary platform. Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969).

29. 398 U.S. at 396 n. 12.

30. Lindgren v. United States, 281 U.S. 38 (1930).

> Whatever may be this Court's special responsibility for fashioning rules in maritime affairs, we do not believe that we should now disturb the settled plan of rights and liabilities established by the Jones Act. [31]

At the same time *Moragne* recognized that *Gillespie* and the Jones Act did not disturb the rights of a seaman's beneficiaries to recover for death on the high seas caused by unseaworthiness under DOHSA. [32] Thus, at the time *Moragne* was before the Court, a remedy for wrongful death based on the general maritime law's unseaworthiness doctrine existed everywhere except within the territorial waters of the states within one marine league from shore as follows:

1. As to non-seamen (such as Higginbotham), in those states whose wrongful death statutes had not been interpreted as granting a remedy based on unseaworthiness.

2. As to seamen (such as Shinn and Nation) in any state.

II. *Moragne*

Longshoreman Moragne's death pointedly posed the problem confronting the beneficiaries of non-seamen because his death occurred aboard a vessel within the territorial waters of the State of Florida. The death occurred outside DOHSA's jurisdiction and the Supreme Court of

31. 379 U.S. at 155.

32. 398 U.S. at 396 n. 12. The reason for this holding is obvious because the Federal Employers' Liability Act, which the Jones Act made applicable to seamen, expressly provides that "[n]othing in this chapter shall be held . . . to impair the rights of . . . employees under any other Act or Acts of Congress." 45 U.S.C. §58 (1970).

Florida had held that Florida's wrongful death act did not permit a recovery based on the general maritime law's unseaworthiness doctrine. While the Jones Act was not available because Moragne was not a seaman, this Court recognized that if *The Harrisburg* was to be overruled and a maritime death remedy based on unseaworthiness created, it would be necessary to determine whether it would apply to seamen as well as non-seamen.[33]

The vessel owner in *Moragne* contended that in passing DOHSA, Congress had ceded exclusively to the States this Court's traditional responsibility for the maritime law, 398 U.S. at 396-7, and therefore this Court could not create a wrongful death remedy under the maritime law to be applicable within the territorial waters of the States. After discussing the legislative history of DOHSA, this Court held:

> Read in the light of the state of maritime law in 1920, we believe this legislative history indicates that Congress intended to ensure the continued availability of a remedy, historically provided by the States, for death in territorial waters . . . .The void that existed in maritime law up until 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in acting to

33. The Court recognized that it had to do so to avoid perpetuating the anomaly that existed in those states whose death acts permitted actions based on unseaworthiness:

> [T]he "strangest" anomaly is that a true seaman--that is, a member of a ship's company, covered by the Jones Act – is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, does have such a remedy when allowed by a state statute. 398 U.S. at 395-6.

> fill that void, legislated only to the three-mile limit because that was the extent of the problem. The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act pre-empted the entire field, destroying the state remedies that had previously existed. 398 U.S. at 397-8.

Having thus recognized that DOHSA pre-empted the field only within its geographical sphere, this Court succinctly held:

> We conclude that the Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law *in situations not covered by the Act.* (Emphasis supplied). [34]

In overruling *The Harrisburg*, this Court created a cause of action under the general maritime law for death caused by the unseaworthiness of a vessel in the only geographical area where no such maritime cause of action then existed–within the three mile limit. It left, however, for "further sifting through the lower courts in future litigation" the issues relating to which beneficiaries of a decedent were entitled to recover and what damages were to be recoverable. 398 U.S. at 408.

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34. 398 U.S. at 402. It should also be recalled that the Court stated: "We find that Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation (death within state territorial waters) of this petitioner." (Parenthetical expression supplied.) 398 U.S. at 393.

III. *Gaudet*

The sifting of the damage issue in the lower courts did not take long, for only 3-1/2 years after *Moragne*, this Court was called upon to decide it in *Gaudet*.[35] Longshoreman Gaudet died as a result of injuries sustained aboard a vessel within the territorial waters of a state. Thus, like longshoreman Moragne, neither DOHSA nor the Jones Act was available to him and his only wrongful death remedy was the one created under the general maritime law by *Moragne*.

In *Gaudet* this Court held that under the judicially created wrongful death remedy within state territorial waters the following items of damages were recoverable:

1. Pecuniary items:

   (a) Loss of support.
   (b) Loss of services.

2. Non-pecuniary items:

   (a) Loss of society.
   (b) Funeral expenses.

Gaudet also recognized the distinction between wrongful death damages and "survival damages," that is, damages to compensate the decedent's estate for damages incurred by him personally, such as conscious pain and suffering, and it recognized that DOHSA has no survival provisions.[36] As

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35. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974).

36. 414 U.S. at 575 n. 2.

Gaudet had previously recovered a judgment for all of the damages sustained by him personally, survival damages were not an issue in *Gaudet*. Survival damages are not at issue here either. Both the court below and the First Circuit in *Barbe* concluded that *Moragne-Gaudet* created a cause of action for "survival damages" as well as for wrongful death damages. [37]

This distinction is crucial for both the *Barbe* court and the court below recognize loss of society as both a wrongful death damage item and non-pecuniary and therefore not recoverable under DOHSA. *Gaudet* permits a recovery of this non-pecuniary death damage item under the *Moragne* wrongful death action. This Court recognized in *Gaudet* that it was thus permitting a recovery of an item of damage under the maritime law which was not available under DOHSA. 414 U.S. at 588 n. 22. We do not here question the Court's power to do so in those areas where Congress has not expressly provided a maritime remedy, such as within the territorial waters of the States involved in both *Moragne* and *Gaudet*. But where Congress has already provided a maritime remedy, neither this Court nor the court below is free to either replace or change the remedy. The broad discretion vested in Congress by the Constitution with respect to the maritime law was affirmatively stated by this Court in declining to declare the Jones Act unconstitutional thusly:

> After the Constitution went into effect, the substantive (maritime) law theretofore in force was not regarded as superseded, or as being only the law of the several states, but as having become the law of the United States,- subject to power in Congress to alter, qualify, or supplement it as experience or changing conditions might require.

37. *Barbe*, 507 F.2d at 799; *Law*, 523 F.2d at 795.

> When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject, and permits of the exercise of a wide discretion. (Parenthetical expression supplied). *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 386 (1924).

Even the case of *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963), quoted and relied on in *Gaudet*[38] for the proposition that "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law", makes it clear that this responsibility extends only to those areas in which Congress has not legislated. In addition to the foregoing statement in *Fitzgerald* about its responsibility, this Court affirmatively recognized the limitation on its responsibility when it held:

> [S]ince Congress in the Jones Act has declared that the negligence part of the claim shall be tried by a jury, *we would not be free*, even if we wished, to require submission of all the claims to the judge alone.(Emphasis supplied) 374 U.S. at 21.

As applied to the present case this statement can be paraphrased thusly:

> Since Congress in DOHSA has declared only pecuniary damages are recoverable for death, we are not free, even if we wished, to require the payment of non-pecuniary damages for loss of society.

Additionally, the Court's quotation from *Moragne* in footnote 22 of *Gaudet* with respect to the legislative history of DOHSA is incomplete and only part of a sentence. The

38. 414 U.S. at 588 n. 22.

complete sentence in *Moragne* reflects that it relates to those areas covered by state remedies and not to those covered by DOHSA:

> To put it another way, the message of the Act is that it does not by its own force abrogate available state remedies; no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law. 398 U.S. at 400.

Both the First Circuit in *Barbe* and the panel of the court below in this case recognized this limitation on the responsibility of the federal courts for fashioning the maritime law of the United States and concluded that DOHSA was the exclusive remedy for wrongful death within its geographical limits, and therefore the damages recoverable should be limited to the pecuniary losses provided by Congress. However, the panel of the court below was foreclosed from reaching this result because another panel of the Fifth Circuit had earlier held in *Law* that the maritime cause of action for wrongful death created in *Moragne* completely replaced DOHSA and that the non-pecuniary loss of society item of death damages was recoverable within, as well as without, DOHSA's geographical limits.

IV. The Divergent Conclusions of *Barbe* and *Law*

The First Circuit's decision in *Barbe* preceded the Fifth Circuit's decision in *Law*. After recognizing that "survival and wrongful death actions have long been recognized as distinct causes of action," and that Congress had not provided a survival action but only a cause of action for death in DOHSA, *Barbe* held that *Moragne* provided ample support for its holding "that there is a federal maritime survival

action, created by decisional law . . . ." 507 F. 2d at 799. But the *Barbe* court flatly rejected the contention that *Moragne* had replaced DOHSA as the remedy for wrongful deaths more than one marine league from shore:

> Since DOHSA clearly provides a cause of action for wrongful death in this case, we fail to see how *Moragne* applies. We hold that the measure of damages for wrongful death provided by DOHSA, namely, "pecuniary loss," controls in the instant case. The Supreme Court in *Moragne* stated that the recognition of a maritime wrongful death action would not "require the fashioning of a whole new body of federal law, but merely removes a bar to access to the existing maritime law." 398 U.S. at 405-406, 90 S.Ct. at 1790. Yet there is a substantial difference between removing a decisional bar like The Harrisburg and circumventing a statutory mandate like DOHSA. We believe that to cast aside DOHSA in favor of the *Moragne* cause of action would be to engage in a "*tabula rasa* restructuring of the law of admiralty," Sea-Land Services, Inc., *supra*, 414 U.S. at 596, 94 S. Ct. at 806, 820 (dissenting opinion), of the sort *Moragne* counseled against. 507 F.2d at 801.

The original opinion in *Law* by the Fifth Circuit was based on that court's erroneous conclusion that both *Barbe* and an earlier decision of the Fifth Circuit in *Dennis*[39] had concluded that *Moragne* applied on the high seas including the geographical area embraced in DOHSA.[40]

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39. Dennis v. Central Gulf S.S. Corp., 453 F.2d 137 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972).

40. The Fifth Circuit said in its original opinion:
> We join the First Circuit in its recent *Barbe* decision to now hold what we said in *Dennis* that *Moragne* applies not only to navigable waters of the States, but to the High Seas as well, including the area defined in DOHSA. 510 F.2d at 250.

On rehearing the Fifth Circuit recognized that *Barbe* had reached exactly the opposite result from that of the Fifth Circuit. It also recognized that its decision in *Dennis* did not support its decision, for it neither cited nor referred to *Dennis* in its opinion on rehearing. It could not cite or refer to *Dennis* on rehearing because one of its assigned reasons for refusing to follow *Barbe* was that the *Barbe* result would produce a lack of uniformity which the admiralty law abhors. The only lack of uniformity, however, is in the items of death damages recoverable under DOHSA (pecuniary only) and *Moragne* (both pecuniary and non-pecuniary). In summary, the uniformity the *Law* court sought on rehearing was in the elements of damages and it could not rely on *Dennis* which had already expressly held this was not the "uniformity" which the admiralty sought:

> The "uniformity" that is fundamental in maritime law has to do with the bases of liability, not with differing elements of damages that may be recoverable in differing circumstances with differing classes of beneficiaries. 453 F.2d at 140.[41]

This Court also recognized uniformity in the elements of damages is not required for wrongful deaths occurring within admiralty's jurisdiction in *Gaudet*.[42]

The other reasons asserted in *Law* on rehearing in support of its holding contrary to *Barbe* are equally unmeritorious:

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41. It is unfortunate that the panel in *Law* did not show the same deference to *Dennis* that the panel in this case showed to *Law*. Had it done so, it would have followed *Barbe* and this case would not be here. In accord with *Dennis* on this uniformity issue are two additional post-*Moragne* cases: Spiller v. Thomas M. Lowe, Jr. & Associates, Inc., 466 F.2d 903, 906-7 (8th Cir. 1972); Greene v. Vantage S.S. Corp., 466 F.2d 159, 165 (4th Cir. 1972).

42. 414 U.S. at 588 n. 22.

Reasons asserted for the conclusion in *Law*	Invalidity of the reason:
1. Nowhere does the Supreme Court indicate that the fact that Gaudet's injury occurred in territorial waters rather than on the High Seas is critical. 523 F. 2d at 796.	The opposite is equally true: there is no indication that it is not critical or that *Moragne-Gaudet* are to replace the Congressional mandate of DOHSA.
2. *Moragne* recognized that "no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." 523 F.2d at 797.	This quotation comes completely out of context as the first part of the sentence from which the quotation is taken reflects this Court is referring to the state remedies and not to DOHSA. The first part of this sentence says: "To put it another way, the message of the Act (DOHSA) is that it does not by its own force abrogate available state remedies;".[43] Furthermore, in *Moragne* this Court expressly limited its ultimate holding to those areas not covered by DOHSA: "We conclude that the Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations *not covered by the Act*." (Emphasis supplied). 398 U.S. at 402.

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43. 398 U.S. at 400 (Parenthetical expression supplied).

3. The pecuniary loss test is inconsistent with the humanitarian principles of the maritime law. 523 F. 2d at 794-5.	The fact that an act of Congress may be considered by the courts to be inconsistent with humanitarian principles as to the damages to be paid under that act, does not give the courts the power to replace the act completely or to change the damages recoverable under it.
4. The *Barbe* decision "adds another anomaly to the three that Mr. Justice Harlan hoped to lay to rest in Moragne." The anomaly is that a complaint having a Rule 9(h) admiralty designation could have only the Death on the High Seas Act as a subject while those filed in a state court or the "law side" of the federal court could claim "the full panoply of recovery under *Moragne*." 523 F.2d at 796-7.	First, under *Barbe*, the *Moragne-Gaudet* theories could not be applied on any docket if the casualty occurred on the "high seas"--only DOHSA is applicable. Second, there is nothing in *Barbe* which produces any anomaly, since the decision prohibits the application of *Moragne-Gaudet* beyond the three mile limit. Third, an action pursuant to the Jones Act or any other maritime theory, including *Moragne-Gaudet*, may at the plaintiff's election be filed pursuant to Rule 9(h) in admiralty.
5. The *Barbe* decision leads to a trifid system predicated upon the docket selected by the litigant. 523 F.2d at 797-8.	The trifid system already exists having been put in operation by the Congress in 1920 when its Jones Act gave a seaman killed on the high seas the right to trial by jury in state or federal court on

his negligence claim but required him to assert his unseaworthiness claim under DOHSA in admiralty. In fact, the *Barbe* decision eliminates this trifid system for all deaths except those involving seamen as it recognizes a geographical line of demarcation established by an act of Congress upon which the docket selected by the litigant has no bearing. On the DOHSA side of the line, only one docket is available--admiralty. On the other side of the line within state territorial waters where *Moragne-Gaudet* are applicable, the plaintiff has the option to select a jury trial on the civil docket or a non-jury trial by designating the case as subject to Rule 9(h) in admiralty.

6. There is no expression of policy to be derived from the legislative history of the Death on the High Seas Act regarding the application of the *Moragne-Gaudet* remedies. 523 F.2d at 797 n. 11.	The *Moragne* opinion was concerned with whether the statute's legislative history demonstrated that state statutes were to be exclusive within the one marine league area. The legislative history of DOHSA shows that during the course of debate on the floor of the House of Representatives, the House considered that ". . . when the Congress legislates in

pursuance of constitutional authority such a law is exclusive."[44]

Despite the *Law* court's attempt to make it appear that the *Barbe* court was creating many problems that would not otherwise exist, as the foregoing demonstrates, this is not the result. Indeed, *Barbe* (1) simply leaves the Congressional wrongful death remedies intact within their designated geographical area where they can continue to be applied uniformly as the admiralty requires while (2) the new *Moragne-Gaudet* wrongful death remedy is also applied uniformly within the territorial waters of the several States--the geographical area which Congress deliberately excluded from DOHSA.

CONCLUSION

Petitioners respectfully submit that this Court should hold that DOHSA and/or the Jones Act constitute the exclusive remedies for wrongful death on the high seas beyond a marine league from shore and reverse the holding of the Court below to the contrary.

Respectfully Submitted,

CARL J. SCHUMACHER, JR.
1106 Arabella Street
New Orleans, La. 70115
(504) 899-8904

44. 59 Cong. Record 4483. See discussion of DOHSA legislative history, *supra*, pp. 9 to 11.

E. D. VICKERY
3710 One Shell Plaza
Houston, Texas 77002
(713) 224-8380

Attorneys for Petitioner,
Mobil Oil Corporation

Of Counsel:

CHARLES C. GRAY
P. O. Box 900
Dallas, Texas 75221
(214) 658-3348

ROYSTON, RAYZOR, VICKERY
& WILLIAMS
3710 One Shell Plaza
Houston, Texas 77002
(713) 224-8380

CERTIFICATE OF SERVICE

The undersigned counsel for petitioner has caused three copies of the foregoing Brief for Petitioner to be served on Jack Benjamin, 1718 NBC Building, New Orleans, La., 70112; Jack Caldwell, 519 Main Street, P.O. Box 592, Franklin, La., 70538; Messrs. Thompson & Sellers, P.O. Box 308, 112 South Louisiana Ave., Abbeville, La. 70510 and I. P. Saal, Jr., P.O. Box 176, Gueydan, Louisiana, by placing in the U.S. Mails, first class postage prepaid, this the 16th day of November, 1977.

CARL J. SCHUMACHER, JR.

Corrected copies mailed and
served this 2nd day of December, 1977.

FOR ARGUMENT

FILED
DEC 16 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76-1726

MOBIL OIL CORPORATION, ET AL.,
Petitioner

versus

MRS. FRANCES NELL HIGGINBOTHAM, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF ON BEHALF OF JEANETTE LEBLANC NATION, AS PERSONAL REPRESENTATIVE OF THE DECEDENT, JAMES E. NATION

SAAL & SAAL
I. P. SAAL, JR.
Post Office Box 176
Gueydan, Louisiana 70542
(318) 536-9210
Attorneys for Respondent,
Nation

A-1 Legal Service, Inc., 227 Chartres St., New Orleans, La. (504) 581-6833

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BRIEF ON BEHALF OF JEANETTE LEBLANC NATION, AS PERSONAL REPRESENTATIVE OF THE DECEDENT JAMES E. NATION

MAY IT PLEASE THE COURT:

The position of the Nation-respondents and the Shinn-respondents are identical in this case. Therefore, counsel for Nation-respondents adopts verbatim the brief submitted by counsel for the Shinn-respondents.

Counsel for Nation waives his appearance and oral argument, and adopts the same position as that advocated in the Shinn case.

Respectfully Submitted,

SAAL & SAAL

BY: _____

I. P. Saal, Jr.
Attorneys for Respondent-
Nation
Post Office Box 176
Gueydan, Louisiana 70542

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief on Behalf of Jeanette LeBlanc Nation, as personal representative of the decedent, James E. Nation, has been served upon Mr. Charles M. Thompson, Jr., Thompson & Sellers, Post Office Box 308, Abbeville, Louisiana 70510; Mr. Jack C. Benjamin, Attorney at Law, 1718 First National Bank of Commerce Building, New Orleans, Louisiana 70112, and Mr. Carl J. Schumacher, Jr., Attorney at Law, 1106 Arabella Street, New Orleans, Louisiana 70115, by placing same in the United States Mail, postage prepaid and properly addressed.

Abbeville, Louisiana, this 9th day of December, 1977.

_____
I. P. Saal, Jr.

Printed copies mailed and
served this 15th day of December, 1977.

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BRIEF FOR RESPONDENTS

THOMPSON & SELLERS
CHARLES M. THOMPSON, JR.
112 South Louisiana Avenue
Post Office Box 308
Abbeville, Louisiana 70510
(318) 893-3107
Attorneys for Respondents,
Mrs. Frances Nell Higginbotham,
et al.

A 1 Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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On Writ of Certiorari to the United States Court of Appeals
For the Fifth Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

On August 15, 1967, a Bell Jet Ranger helicopter, owned by Mobil Oil Corporation, petitioner herein, crashed into the high seas off the coast of Louisiana. The pilot and all three passengers aboard the helicopter were killed in the crash. Shortly before the crash, the helicopter, which was used by Mobil in its offshore oil and gas drilling operations, had picked up the three passengers at an offshore platform. These passengers were Marshall K. Higginbotham, an employee of Baxter Drilling Company, and James Shinn and James Nation, both Mobil employees.

As a result of the crash, suits were filed on behalf of all of the passengers and the pilot of the helicopter. All of the suits were consolidated for trial in the District Court. In

the non-jury trial, the court found Mobil liable to the survivors of Higginbotham and Shinn on the basis of res ipsa loquitur. The other defendant in the case, Bell Helicopter Company, the manufacturer of the helicopter, was dismissed from the lawsuit as the court found no liability on its part.

Damages were awarded to the survivors of Higginbotham under the provisions of the Death on the High Seas Act and the general maritime law as set forth in the *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772 (1970). As to the decedent, Shinn, a seaman, the District Court held the survivors to have actions under DOHSA, the general maritime law and the Jones Act. The District Court found the exclusive remedy of the survivors of Nation, who was found to have been assigned to a fixed platform on the Outer Continental Shelf at the time of his death, to be benefits available under the Longshoremen and Harbor Workers' Compensation Act as made applicable to the Outer Continental Shelf by the Lands' Act (43 U.S.C. A. Section 1331, et seq.)

On appeal to the United States Court of Appeal, Fifth Circuit, the finding of liability against Mobil Oil on the basis of res ipsa loquitur was affirmed as was the dismissal of Bell from the action. The Court further affirmed the findings of the remedies available to the survivors of Higginbotham and Shinn and reversed the District Court's ruling as to the status of Nation. The Fifth Circuit found that he was a seaman, therefore entitling his survivors to remedies under DOHSA, the general maritime law and the Jones Act. The Court of Appeal also reversed the award of damages to the survivors of Higginbotham, holding that the award contained an inflationary factor.

Following the rendition of the judgment by the Fifth Circuit, a number of petitions for writs of certiorari were filed in this Honorable Court. However, with the exception of the question presented herein, all of the writs were denied.

In essence, the question presented by petitioner in its writ of certiorari is whether the maritime action for wrongful death recognized in *Moragne v. States Marine Lines*, supra, was intended to replace the Death on the High Seas Act in cases of death occurring more than a marine league from shore. Petitioner argues that this question must necessarily be answered in the affirmative unless the Court restricts the Moragne wrongful death action to areas not previously covered by DOHSA. Unless the Moragne remedy is so limited, petitioner asserts that this Court will have judicially repealled DOHSA and replaced it with a non-statutory remedy. This, petitioner continues, is not a proper exercise of this Court's power since Congress, in passing DOHSA, intended that it be the exclusive remedy for wrongful deaths occurring on the high seas, and thereby precluded this Court from fashioning a judicial remedy for wrongful death within the same geographical sphere as DOHSA.

ARGUMENT

I. HISTORY

The question of whether or not the general maritime law permitted recovery for wrongful deaths occurring within its jurisdiction was first presented to the Court in 1886 in *The Harrisburg*, 119 U.S. 358, 7 S. Ct. 140 (1886). In that case,

a widow sought damages, under the general maritime law, for the death of her husband in a vessel collision caused by the defendant's negligence. The Court reviewed the history of the common law in regard to actions for wrongful death, then held that in the absence of a statute which allowed such a remedy, no action was cognizable under the general maritime law.

In the years following the decision in *The Harrisburg*, various state laws were enacted to provide actions for wrongful deaths occurring within state waters. In some instances, these state laws were held to provide a remedy for wrongful death occurring on the high seas in an effort to provide some relief against the harshness of *The Harrisburg*. See: *The Hamilton*, 207 U.S. 398, 29 S.Ct. 133 (1907).

In 1920, Congress acted to provide a means of recovery for wrongful death occurring on the high seas with the passage of the Death on the High Seas Act. 46 U.S.C. §761 et seq. This act provided for the recovery of damages for death "caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States . . ." 46 U.S.C.§ 761. In the same year, Congress also enacted the Jones Act 46 U.S.C. · 688 et seq which provided an action on behalf of seamen or their survivors for injuries or wrongful death caused by the negligence of an employer - vessel owner. Under the express terms of DOHSA, recoverable damages were limited to items of pecuniary loss. 46 U.S.C. §762. Cases interpreting the Jones Act have reached the same conclusion. *Davis v. Parkhill - Goodloe Co.*, 302 F.2d 489 (C. A. 5th Cir., 1962); *Mpliris v. Hellenic Lines, Ltd.*, 323 F. Supp. 865 (S.D. Tex., 1970) affirmed at 440 F.2d 1163 (C.A. 5th Cir., 1973).

The Court was again faced with the question it first considered in *The Harrisburg* in 1970 when *Moragne v. States Marine Lines*, supra, was before the Court. In a unanimous opinion authored by Mr. Justice Harlan, the Court proclaimed that the general maritime law does indeed provide a cause of action for wrongful death. In so holding, the Court specifically overruled *The Harrisburg*, without qualification.

While the Court in *Moragne* declared the existence of the general maritime law's wrongful death action, it did not spell out the specifics of the action such as who the beneficiaries might be, the appropriate statute of limitations, or what damages would be recoverable under the action. Instead, the Court left these issues to be sifted out by the lower courts in future cases. Subsequently in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806 (1974), the Court determined that the damages recoverable under the Moragne wrongful death action are not limited to pecuniary loss alone, but may also encompass such items of recovery as loss of society. The Court rejected the pecuniary loss standard of DOHSA as being inconsistent with "the humanitarian policy of the maritime law to show special solicitude for those who are injured within its jurisdiction." 414 U.S. at 588, 94 S.Ct. at 816.

With this brief historical perspective as a background, petitioner urges this Court to find that the Moragne remedy, and the damages recoverable under it by virtue of *Gaudet*, must be limited to those geographical areas where DOHSA does not apply i.e. state waters. Failure to so limit Moragne

will, according to petitioner, result in this Court's unwarranted judicial superimposition of a non-statutory remedy in place of DOHSA, an act of Congress intended to be the exclusive remedy within its territorial perimeters.

II. EXCLUSIVITY OF DOHSA

Petitioner asserts that the Court in *Moragne* sought to limit its holding to those areas not encompassed by the Death on the High Seas Act. In support of this contention, petitioner cites the legislative history of DOHSA as an affirmative indication that Congress intended DOHSA to be the exclusive remedy on the high seas. Petitioner quotes extensively from the legislative history of the Death on the High Seas Act and asserts that the floor debate on DOHSA in the House of Representatives conclusively shows Congress' intention that DOHSA be exclusive within its geographical area.

The Court in *Moragne* reviewed the same legislative history that petitioner now cites. While petitioner reads this history to indicate that Congress intended that DOHSA be the exclusive remedy for wrongful death on the high seas, the *Moragne* Court found no such intent present in the legislative history. In point of fact, the Court found just the opposite to be the case:

> "No intention appears that the Act [DOHSA] have the effect of foreclosing any non-statutory federal remedies that might be found appropriate to effectuate the policies of general law." 398 U.S. at 400, 90 S.Ct. at 1787.

Thus, faced with the same legislative history that petitioner

now argues shows an intention to make DOHSA an exclusive remedy, the Court in *Moragne* reached just the opposite result.

The excerpts from the legislative history of DOHSA quoted by petitioner, when reviewed in their true context, [1] show that the only reference to exclusivity contained in the House floor debates was in relation to the jurisdiction of the federal admiralty courts to hear DOHSA suits. This was recognized by Justice Harlan in *Moragne*:

> ". . .If we found from the legislative history that Congress imposed exclusive jurisdiction because of a desire to avoid the presentation of wrongful death claims to juries, that might support an inference that Congress meant to forbid the non-statutory maritime actions for wrongful death, which might come before state or federal juries. (Citation omitted) However, that is not the case. The only discussion of exclusive jurisdiction and the legislative history is found in the House floor debates, during the course of which Representative Volstead, floor manager of the bill and chairman of the Judiciary Committee, told the members that exclusive jurisdiction would follow necessarily from the fact that the act would be part of the federal maritime law. (Citation omitted) This erroneous view disregards the 'saving clause' in 28 U.S.C. §1333, and the fact that federal maritime law is applicable to suits brought in state courts under the permission of that clause . . . from this, we can derive no expression of policy bearing on

1. The full text of the House floor debate on DOHSA is reported in 59 Cong. Rec. 4482-4487.

the matter under discussion". 398 U.S. at 400 n. 14, 90 S.Ct. at 1787 n. 14:

In this manner Justice Harlan dismissed the proposition that DOHSA precludes any other wrongful death remedy on the high seas.

The Court also addressed the question of the exclusivity of DOHSA in *Sea-Land Services, Inc. v. Gaudet*, supra:

> "We recognize, of course, that our decision permits recovery of damages not generally available under the Death on the High Seas Act. Traditionally, however, 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of the admiralty law' *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20, 83 S.Ct. 1646, 1650, 10 L.Ed. 2nd 720 (1963). The scope and content of the general maritime remedy for wrongful death established in *Moragne* is no exception. After combing the legislative history of the Death on the High Seas Act, we concluded in *Moragne* that Congress expressed 'no intention . . . of foreclosing any non-statutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.' Nothing in the legislative history of the Act suggests that Congress intended the Act's statutory measure of damages to pre-empt any additional element of damages for a maritime wrongful death remedy which this court might deem 'appropriate to effectuate the policies of general maritime law.' To the contrary, Congress' insistance that the act not extend to territorial waters . . . indicates that Congress was not

> concerned that there be a uniform measure of damages for wrongful deaths occurring within admiralty's jurisdiction, for in many instances state wrongful death statutes extending to territorial waters provided a more liberal measure of damages than the Death on the High Seas Act. See *Greene v. Vantage S.S. Corp.*, 466 F.2d 159 (CA 4 1972)." 414 U.S. at 587, n. 22, 94 S.Ct. at 816, n.22.

Respondents herein submit that the excerpts from *Moragne* and *Gaudet* quoted above make it abundantly clear that this Court has already determined the question of the exclusivity of the wrongful death remedy provided in DOHSA, and that this determination rejects the position adopted by petitioner. Respondents further submit that the *Moragne* cause of action supplements DOHSA and provides an additional remedy for the survivors of those persons who meet death on the high seas. In this regard, *Moragne* strengthens the very purpose that DOHSA was initially designed to serve, that is to expand the rights of the survivors of persons killed on the high seas in light of the restrictive rule set forth in *The Harrisburg*. *Moragne* continues the long standing tradition of the Court in maritime litigation of construing seamen's remedies under the federal statutory and general maritime law as supplementary, and not preclusive. To now hold that DOHSA precludes the existence of an additional remedy made available by the overruling of *The Harrisburg* would indeed be an ironic twist of fate in view of the very purpose for which DOHSA was initially passed.

It being clear from the legislative history of DOHSA that

this act was not intended to be exclusive, the Court in *Moragne* properly extended the wrongful death action set forth therein to all cases in admiralty, regardless of whether the cause of action arises on the high seas or in state waters. This the court clearly has the power to do:

> "Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases." 398 U.S. at 393; 90 S.Ct. at 1783.
>
> "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20, 83 S.Ct. 1646, 1650 (1963).

Further support for the proposition that the statutory remedy provided in DOHSA can exist side by side with the judicial remedy set forth in *Moragne* is provided by those cases wherein other statutory remedies have been deemed to co-exist with federal non-statutory law. For example, a seamen's rights under the general maritime law to sue his employer for injuries caused by unseaworthiness, or for death on the high seas caused by unseaworthiness, exist alongside his Jones Act claim. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 78 S.Ct. 1201 (1958), *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S.Ct. 394 (1958). And, while the Court in *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 85 S.Ct. 308 (1964), held that where the Jones Act, by providing a claim for wrongful death based on negligence, precludes any state remedy for

wrongful death to a seaman in territorial waters, whether based on negligence or unseaworthiness, there was no question of preclusion of a federal remedy before the Court at that time, since no such remedy was thought to exist at the time that case was decided. Thus, while the Jones Act may preclude a state remedy for wrongful death based on negligence or unseaworthiness, it would not preclude a federal remedy. *Moragne v. States Marine Lines, Inc.*, 398 U.S. at 375, n. 12, 90 S.Ct. at 1785 n. 12.

III. UNIFORMITY OF REMEDY AND RECOVERY

Having thus established that Congress did not intend DOHSA to be the exclusive remedy for wrongful death on the high seas, and that this Court therefore has the power to fashion a wrongful death remedy such as *Moragne*, a separage but closely related question arises. In view of the fact that DOHSA already provides recovery for wrongful deaths occurring on the high seas, why should this Court make the *Moragne* remedy applicable on DOHSA waters? Respondents submit that the key element in answering this question is the need for uniformity in the admiralty practice spoken of by Mr. Justice Harlan in *Moragne*.

In *Moragne*, the Court expressly overruled *The Harrisburg*, finding that the principles on which *The Harrisburg* ruling was based were unsound and incorrect. From this, it would appear that *The Harrisburg* was an incorrect statement of the law at the time it was decided. Therefore, the wrongful death remedy under the general maritime law has always existed, though *The Harrisburg* barred the assertion of this action. As the general maritime wrongful death action always existed, there was in actuality no need that Congress enact DOHSA or the wrongful death provisions of

the Jones Act. The purposes of these acts were to fill what Congress believed to be a void, that is the absence of a wrongful death remedy under the admiralty jurisdiction.

In seeking to remedy the lack of a maritime wrongful death action not thought to exist, the Courts construing DOHSA and the Jones Act, together with the general principles of non-statutory maritime law, reached many confusing and inconsistent conclusions. Areas of the admiralty judisdiction were left uncovered by any wrongful death action. There was a lack of uniformity on the subject of maritime wrongful death actions.

Of course, had the courts in *The Harrisburg* recognized the existence of the general maritime wrongful death action, no such non-uniformity would have resulted. The Jones Act death provisions and DOHSA would not have needed to be enacted. There would have already been a single uniform cause of action for wrongful death occurring on any waters subject to the admiralty jurisdiction. But this was not the case. It was only after the decision in *Moragne* that the wrongful death action provided by maritime law was recognized. As uniformity would have resulted had the action been recognized in *The Harrisburg*, would the purpose of uniformity not be defeated by now holding the action is not uniform in all areas of admiralty jurisdiction, but is limited only to state waters?

In *Moragne*, one of the primary considerations of the Court was the need for uniformity in maritime litigation. The existence of the three "anomalies" was of great concern to the Court. The situations presented in these anomalies were the very opposite of the uniformity sought by

the Court. This non-uniformity of remedy was corrected by the Court's decision in *Moragne*. On the subject of uniformity, the Court in *Moragne* stated:

> "Our recognition of a right to recovery for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. (Citations omitted). Such uniformity not only will further the concerns of both of the 1920 Acts but will also give effect to the constitutionally based principle that federal admiralty law should be 'a system of law co-extensive with, and operating uniformally in, the whole country'. *The Lottawanna*, 21 Wall. 558, 575, 22 L.Ed. 654 (1875)." 398 U.S. at 401- 402, 90 S.Ct. at 1788.

The uniformity sought by the Court in *Moragne* is present only if the maritime cause of action recognized therein applies to the whole of the admiralty jurisdiction. To adopt the position advocated by petitioner would create situations of vastly differing result under the same factual situations.

For example, should the Court rule that the *Moragne* cause of action applies only in those areas not covered by DOHSA, it is not inconceivable that the following situation could occur. If a vessel should, while at sea, be in such a position that while crossing the imaginary line which would separate the jurisdictional boundaries of *Moragne* from those of DOHSA, that is the three mile limit, it would be entirely conceivable that the survivors of a person killed on

one end of the vessel would have remedies available under the general maritime law in addition to other available remedies, while the survivors of a person killed at the other end of the vessel would be restricted to recovery under DOHSA. Thus, the survivors of one of the decedents would be entitled to recover the full range of benefits set forth in *Gaudet*, while the survivors of the other decedent would be restricted to the pecuniary loss test set forth in DOHSA. Thus, under situations created by a common disaster, differing results would occur. This is not uniformity, this is the lack of it.

The only uniformity resulting from the position adopted by petitioner is that there would be a wrongful death remedy of some kind for all persons subject to the maritime jurisdiction. However, which remedy and what items would be recoverable under it would be solely dependent on the situs of the death. Courts seeking to apply the law under these circumstances would be forced to inquire into geographical areas before deciding what remedies were available to the respective claimants. Is it not much simpler to provide a uniform remedy with the same recovery for all persons entitled to assert it? This is the advantage to be gained from uniform application of *Moragne* to all waters, state or high seas. Respondents submit this is the message of *Moragne* and it should be confimred herein.

IV. THE BARBE - LAW CONFLICT

Petitioner asserts that support for its position is afforded by the decision of the First Circuit Court of Appeal in *Barbe v. Drummond*, 507 F.2d 794 (C.A., 1974). In *Barbe*, the administrator of the estate of a passenger who died when a small boat sank on the high seas instituted an action

seeking damages for the decedent's conscious pain and suffering prior to death and funeral expenses. The First Circuit held, noting the distinction between a survival action as asserted by the administrator, and a wrongful death action as set forth in *Moragne*, that there is, under federal decisional law, a maritime survival action permitting recovery for conscious pain and suffering. On this basis, the Court allowed those damages. However, the Court refused to award funeral expenses, basing its denial on a restrictive reading of *Moragne*. The *Barbe* court held that *Moragne* must be limited to state waters since DOHSA was the exclusive remedy for wrongful death on the high seas.

In *Law v. Sea Drilling Corp.*, 510 F.2d 242, reh. denied, modified in part, 523 F.2d 793 (C.A. 5th Cir., 1975), a case decided subsequent to the *Barbe* ruling, the Fifth Circuit affirmed a District Court award of damages for conscious pain and suffering prior to death and loss of society arising out of a death that occurred on the high seas. The award of damages for conscious pain and suffering was premised on the same basis that the *Barbe* Court allowed recovery, that is the existence of a federal non-statutory survival action.

However, on the question of *Moragne's* applicability more than a marine league from shore the cases reached differing conclusions. *Barbe* reaches the conclusion that *Moragne* is limited to state waters in view of the fact that DOHSA was intended as the exclusive remedy for deaths occurring on the high seas. *Law* rejects this argument and hold that *Moragne* is a uniform remedy throughout the admiralty jurisdiction. Thus, on this critical issue, the First and Fifth Circuit appear to be in direct opposition.

As the two cases appear irreconcilable on this point, only this Court can determine which case presents the proper interpretation of *Moragne*. Of course, respondents submit the holding reached by the *Law* court is proper. The *Barbe* decision adopts as its basis the contention that DOHSA is the exclusive remedy for deaths occurring on the high seas. As has been demonstrated herein, this position is not supported by the legislative history of DOHSA. The court in *Moragne* decided the question of DOHSA's exclusivity and rejected it. Thus, as the basis of the *Barbe* holding cannot be supported, it is submitted the case is simply incorrect.

CONCLUSION

In light of the foregoing, respondents respectfully pray that this Court hold the *Moragne* wrongful death remedy to be applicable on all navigable waters, be they state waters or the high seas, and affirm the holding of the Court below.

Respectfully Submitted,

THOMPSON & SELLERS

BY: _____

Charles M. Thompson, Jr.
Attorney for Respondents
Francis Nell Higginbotham,
et al.
Post Office Box 308
Abbeville, Louisiana 70510

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief for Respondents has been served on Mr. Carl J. Schumacher, Jr., 1106 Arabella Street, New Orleans, Louisiana 70115; Mr. Jack C. Benjamin, 1718 NBC Building, New Orleans, Louisiana 70112; Mr. Jack C. Caldwell, 519 Main Street, Post Office Box 592, Franklin, Louisiana 70538 and Mr. I. P. Saal, Jr., Saal & Saal, Post Office Box 176, Gueydan, Louisiana by placing same in the United States mail, postage prepaid and properly addressed.

Abbeville, Louisiana, this 9th day of December, 1977.

s/ Charles M. Thompson, Jr.
Charles M. Thompson, Jr.

Printed copies mailed and
served this 15th day of December, 1977.

Supreme Court, U. S.
FILED
DEC 19 1977
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FOR ARGUMENT

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76 - 1726

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Petitioner

versus

MRS. FRANCES NELL HIGGINBOTHAM, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

RESPONSIVE BRIEF ON BEHALF OF MRS. ARLINE J. SHINN

JACK C. BENJAMIN

On The Brief:

ARTHUR A. CRAIS, JR.
1718 First National Bank of
Commerce Building
New Orleans, Louisiana 70112

504 - 522 - 2304

OF COUNSEL:
KIERR, GAINSBURGH,
BENJAMIN, FALLON
& LEWIS

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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THE QUESTION PRESENTED

The issue presented to the Court in this litigation is whether the cause of action for wrongful death under the General Maritime Law which this Court recognized in *Moragne v. States Marine Lines*, in overruling *The Harrisburg*, supplements the Jones Act and the Death on the High Seas Act to allow recovery of nonpecuniary damages.

ARGUMENT

"The Basis of *Moragne v. States Marine Lines*"

"We accordingly overrule *The Harrisburg*, and hold that

an action does lie under *General Maritime Law* for death caused by violation of maritime duties." [1] This Court, speaking through Mr. Justice Harlan in *Moragne*, unanimously reversed nearly a century of jurisprudence and recognized the existence of a cause of action for wrongful death under the General Maritime Law. The pithy and unambiguous statement representing the holding of this Court is unrestricted and contains no territorial or geographic boundaries or limitations. The cause of action for wrongful death enunciated by this Court in *Moragne* and explained further in *Sea-Land Services v. Gaudet*, [2] runs in favor of the beneficiaries of decedents " 'who go down to the sea in ships and do their business on the great waters' " [3] regardless of the location of the delict--whether on the high seas or within the territorial waters of a state or nation.

At issue in *The Harrisburg* [4] was whether one could maintain a "suit in admiralty . . . in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable from the sea . . .?" [5] The Court deductively reasoned that the roots of American maritime law are embedded deeply in the soil of British admiralty practice, which at that time precluded this cause

1. *Moragne v. States Marine Lines*, 398 U.S. 375, 26 L.Ed. 2d 339, 361 (1970).

2. 414 U.S. 573, 39 L.Ed. 2d 9 (1974).

3. *The Highland Light*, Chase's Dec. 150, quoted in *The Harrisburg*, 119 U.S. 199, 30 L.Ed. 358, 360 (1886).

4. 119 U.S. 199, 30 L.Ed. 358 (1886).

5. *The Harrisburg, supra*, 30 L.Ed. at 359.

of action, also; and the Court overruled a long line of district and circuit court authority to hold that no action lies in admiralty for deaths occurring on the high seas or on the navigable waters. A major basis for the Court's opinion denying the wrongful death action is succinctly summarized in one statement by the author of that opinion: "[W]e know of no country that has adopted a different rule on this subject for the sea from that which it maintains on land". [6] However, the Court in *The Harrisburg* did not restrict its holding to territorial waters; it extended to the high seas, also.

In *Moragne*, Mr. Justice Harlan scrutinized the rationale of the common law doctrine precluding recovery for wrongful death, the ground upon which *The Harrisburg* was decided. The rule denying recovery of compensatory damages for the wrongful death of an individual was based on the concept that the wrongful act constituted both a tort and a felony; as such, the offending party's property was confiscated by the state, and the felony was punishable by death. The United States did not adopt the felony merger doctrine; while the felonious act of the offending party could be punishable, his property was not confiscated by the state.

This Court in *Moragne* stated that it was difficult to discern an adequate reason for extending the common-law rule to actions governed by maritime law. The admiralty had always been a separate body of law apart from that of common law: (1) It was administered by different courts; (2) its roots were in the civil law; and (3) it developed general principles different from those of the common law recognizing a special solicitude for those who embark on hazar-

6. *Id.* at 382.

dous duties on the sea.

Then, turning to ascertain whether there is any legislative or public policy prohibiting wrongful death actions in admiralty, this Court concluded that there was none.

Decisional law often finds its bases in legislative enactments. As Justice Harlan in *Moragne* stated, particular legislation plays a broader role than the limited parameters drawn by the enactments of a legislative body. It is an obligation of the Court to interweave legislative policies with the body of decisional legal principles.[7] In the United States, every state has enacted wrongful death legislation; in addition, the Congress has enacted a body of laws permitting recovery for wrongful death. (Federal Employees Liability Act,[8] Jones Act,[9] Death on the High Seas Act,[10] Federal Tort Claims Act[11] and Longshoremen and Harbor Workers' Compensation Act[12]) Accordingly, this Court reasoned that the heretofore existing public policy against recovery for wrongful death had been abrogated; and, rather, the public policy now is to favor recovery for the wrongful death of an individual.

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7. *Moragne, supra,* 26 L.Ed. 2d at 352.

8. 45 U.S.C.§§51, *et seq.*

9. 46 U.S.C. § 688.

10. 46 U.S.C§§761, *et seq.*

11. 28 U.S.C. §§1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671, *et seq.*

12. 33 U.S.C§§901, *et seq.*

When this Court reconsidered its decision in *The Harrisburg* and overruled it finding its reliance on English authority for wrongful death actions misplaced, practitioners before the admiralty bar had thought that a final vestige and yoke of anachronistic legal authority had been thrown off and discarded from American maritime law. However, old theories and historical precedents, no matter how misplaced or misguided their logic and basis may be, die slowly and often attempt to rear their heads in a last chance at survival, only to realize finally that their days have long since gone and like victims to the vicissitudes of life at sea are lain to rest at last. Respondent rhetorically asks, as did the author of the opinion in *The Harrisburg:* "Why should a different rule be adopted on this subject for the high seas from that which it [applies] on land and on territorial waters?" Clearly, such an arbitrary and illogical conclusion cannot be defended on moral, rational or legal grounds.

"DOHSA and the Jones Act Are Not Exclusive Remedies"

Petitioner submits to this Court that the Death on the High Seas Act[13] and/or the Jones Act[14] is the exclusive remedy for deaths occurring on the high seas. As Congress has enacted legislation to provide a remedy and a basis for recovery for deaths occurring on the high seas, the area is preempted, and the courts are precluded from delineating the rights, duties and liabilities of parties in that field.

Yet, petitioner ignores the interplay and relationship in the field of maritime law between statutory authority and

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13. *Supra,* n. 10.

14. *Supra,* n. 9.

jurisprudential authority. Admiralty law and practice in the United States constitutes both statutory and jurisprudential elements which have been woven together into a flexible fabric. As this Court in *Fitzgerald v United States Lines Co.*[15] stated:

> Article III of the Constitution vested in the federal courts jurisdiction over admiralty and maritime cases, and, since that time, the Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law. This Court has long recognized its power and responsibility in this area and has exercised that power where necessary to do so.

Petitioner's position that DOHSA and/or the Jones Act is the exclusive remedy for deaths occurring on the high seas and that decisional law, *Moragne* and *Gaudet*, cannot supplement the congressional enactments is untenable, particularly when one considers that the courts in the past have so judiciously woven together the rights and remedies afforded to seamen by statutory as well as decisional law. The Jones Act [16]was enacted by Congress to overrule the fellow-servant doctrine, thus affording a seaman a cause of action for negligence against his employer. It is elementary in admiralty law that the Jones Act is not the sole and exclusive remedy afforded to seamen for personal injuries sustained while in the service of the vessel; a seaman has at his disposal the additional remedy of unseaworthiness, a remedy created by decisional law. The proposition advanced by petitioner in this cause would have the Court ignore this type of interelationship between statutory and

15. 374 U.S. 16, 10 L.Ed. 2d 720, 724 (1963).

16. *Supra*, no. 9.

decisional remedies created for the benefit of an injured seaman.

In addition, the courts have interpreted neither DOHSA nor the Jones Act to be the exclusive remedy to recover for the death of a seaman on the high seas. The Second Circuit in *Doyle v. Albatross Tanker Corp.*[17] answered that inquiry in the negative stating:

> There is not a whisper in the text of the Jones Act or its legislative history to indicate that, with respect to seamen in the special area covered by the Death on the High Seas Act, Congress intended the Jones Act to supersede the Death on the High Seas Act . . . . Moreover, it appears to be the settled law of the lower federal courts, expressed in numerous cases, that both statutory remedies may be availed of for the purpose of recovering damages for the wrongful deaths of seamen caused by occurrences on the high seas, and that the action in admiralty created by the Death on the High Seas Act may be pursued by the personal representative of a deceased sailor as well as the action at law provided for in the Jones Act.

The Jones Act, while it provides a remedy to recover damages from the employer for the death of the seaman, allows recovery only on the basis of negligence. Yet, the courts have augmented this statutory remedy with the

17. 367 F.2d 485, 466-467. (See, also, *Petition of Risdal & Anderson, Inc.*, 291 F.Supp. 353 (D. Mass. 1968); *Peace v. Fidalgo Island Packing Co.*, 419 F.2d 371 (9th Cir. 1969); G. Gilmore and C. Black, Jr., *The Law of Admiralty*, § 6-31 at 364 (2d Ed. 1975).

Death on the High Seas Act's more liberal basis of recovery, that is, for the breach of the warranty or seaworthiness. [18] In addition, DOHSA, in supplementing and complementing the Jones Act, affords a remedy for an additional class of beneficiaries to that of the Jones Act. [19] Furthermore, a claimant may join a claim under the Jones Act with an action based on the breach of warranty of seaworthiness and with that of the traditional maritime remedy for maintenance and cure and have all actions tried to a jury. [20] This interplay of statutory remedies and the integration of statutory and decisional law are the hallmarks to the flexibility of the admiralty. As these elements have been woven together, so can the now judicially recognized action for wrongful death under the General Maritime Law be added as another strand to strengthen that fabric which constitutes the admiralty law of the United States.

The interrelationship of statutory remedies is not limited to the interaction between these federal statutes, DOHSA and the Jones Act. In addition, the admiralty courts have traditionally enforced rights afforded to litigants by state law. As Mr. Justice Frankfurter in *Romero v. International Terminal Operating Co.* [21] stated:

> Although the corpus of admiralty law is federal in the sense that it derives from the implication of Article 3 evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the

18. 2 *Benedict on Admiralty*, § 81 at 7-8 (7th Ed. 1975).

19. *The Four Sisters*, 75 F.Supp. 399 (D. Mass. 1947).

20. *Fitzgerald, supra*, n. 15

21. 358 U.S. 354, 3 L.Ed. 2d 368, 382 (1959).

> States and the National Government in their regulation of maritime commerce.

Despite the fact that Congress has enacted legislation governing maritime liens,[22] the remedies and rights afforded by this legislative authority are not exclusive, for liens created by state laws are enforceable in admiralty. In addition, the admiralty borrows from and enforces state laws and rules for "the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under the contracts of maritime insurance. . . ." [23] The liberal policy of the admiralty law to adopt and borrow from other bodies of law is a tribute to its adaptibility and vitality which allows it to set trends rather than lag behind as a mere follower of precedent and tradition.[24]

In addition, that DOHSA evidences no intention on the part of Congress to make the Act the sole and exclusive remedy for deaths occurring on the high seas is clear from the legislative history and debates on the floor of the House of Representatives. As originally proposed, Section 7 of the Act stated as follows:

> That the provisions of any state Statute giving or regulating rights of action or remedies for death shall not be affected by this Act as to causes of action accruing within the territorial limits of any State.[25]

22. 46 U.S.C.§§971, *et seq.*

23. *Romero, supra*, 3 L.Ed. 2d at 383.

24. See, also, *Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971).

25. 59 *Cong. Rec.* 4480 (1920).

The legislative debates on the Act demonstrate that one of the major concerns of congressmen was that Section 7, as originally proposed, might restrict the rights of action and remedies afforded by state law to its citizens.[26] Congressman Mann of Illinois led the opposition to Section 7 because of his concern that the legislation would abrogate a citizen's right to remedies extended to him by state law. He, therefore, successfully brought an amendment to the Act deleting the last clause, leaving Section 7 to read as follows:

> That the provisions of any state Statute giving or regulating rights of action or remedies for death shall not be affected by this Chapter.[27]

---

26. *Id.*, at 4484.

27. 46 U.S.C. § 768:

> THE SPEAKER PRO TEMPORE. The gentleman from Illinois offers an amendment, which the Clerk will report. The Clerk read as follows:
>
> Amendment offered by Mr. Mann of Illinois: Page 3, line 12, after the word "act," strike out "as to causes of action accruing within the territorial limits of any State."
>
> MR. MANN OF ILLINOIS: Now, I do not know whether I am right or wrong about it, because I have not examined the report on this bill carefully as reported this time. But I remember this bill very distinctly in previous Congresses, and my impression, which very likely may be erroneous, is that the purpose of the bill was to confer jurisdiction in certain cases of death where no jurisdiction now exists. I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any State court. I may be wrong about that. I notice in the report in one place, on page 2, this statement from somebody:

This Court in *Gaudet*, after studying the legislative history of DOHSA, found that the legislation and the congressional intent do not abate or preclude the creation of a jurisprudential remedy to operate concurrently with the statutory scheme:

> We recognize, of course, that our decision permits recovery of damages not generally available under the Death on the High Seas Act. . . . After combing the legislative history of the Death on the High Seas Act, we concluded in *Moragne* that Congress expressed 'no intention . . . of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.' [Citation omitted.] Nothing in the legislative history of the Act suggests that Congress intended the Act's statutory measure of damages to pre-empt any additional elements of damages for a maritime wrongful death remedy which this Court may deem 'appropriate to effectuate the policies of general maritime law.'[28]

(Footnote 27 - Continued)

> We are very anxious to have the bill go through in its present simple form, which avoids conflict with State statutes and yet remedies a crying defect in the maritime law as administered in this country – and so forth.
>
> *If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the territorial limits of the State or not.* In other words, if a man had a cause of action and could get service, he could sue in a State court and not be required to bring suit in the Federal court. 59 Cong. Rec. at 4484, emphasis supplied.

28. *Gaudet, supra*, 39 L.Ed. 2d at 23, no. 22.

Thus, this Court has previously held that DOHSA is not exclusive and that the General Maritime Law operates as a supplement to augment the previously provided statutory remedy.[29]

It has been held by this Court that it is not inimical to the interests of the Maritime Law to apply state laws in maritime causes of action.[30] In *The Hamilton*,[31] the Court, through Mr. Justice Holmes, unequivocally held that state law in an action for wrongful death between citizens of the same state could be utilized by the claimant as a means of recovery for wrongful death. The passage of DOHSA, as amended, did not in any way restrict, limit or affect the holding of this Court in that case.[32]

It is further evident from the congressional debates on the Act that DOHSA was intended to be a jurisdictional statute, only conferring jurisdiction in the federal court for deaths occurring on the high seas. A primary concern during the debates was the effect of encroaching federal jurisdiction on that of the state courts.[33] The Act removed a jurisdictional bar; it did not create an exclusive remedy.

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29. See, also, S. Speiser 2 *Recovery for Wrongful Death 2d*, § 14:5 at 421-422, n. 64, wherein the author implicitly criticizes the First Circuit's reasoning in *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974), that DOHSA is the exclusive remedy for deaths occurring on the high seas; see, also, G. Gilmore and C. Black, Jr., *The Law of Admiralty*, §6-31 at 365.

30. *Romero, supra*, n. 21.

31. 207 U.S. 398, 52 L.Ed. 264 (1907).

32. See, also, *Dugas v. National Aircraft Corp., supra*, n. 24.

33. 59 *Cong. Rec.* 4482-4486 (1920).

It is further submitted that, with respect to the elements of damages recoverable under DOHSA, the Act is not exclusive, for by its express provisions the incorporation of foreign law is permitted to supplement the damages recoverable under the Act. Section 764 states as follows:

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.[34]

In *McLaughlin v. Blidberg Rothchild Co.*,[35] two libels were brought to recover for the wrongful death of an American seaman occurring in Japan. The first libel was for the recovery of the pecuniary damages sustained and was predicated on the Jones Act and DOHSA; the second was to recover the nonpecuniary damages sustained by the decedent, including the pain and suffering of the decedent, and was predicated on the wrongful death provisions of the Japanese Civil Code. The court permitted the integration of these bases of recovery to allow the litigants to be compensated for the pecuniary, as well as the nonpecuniary, damages.

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34. 46 U.S.C. § 764.

35. 156 F.Supp. 379 (S.D. N.Y. 1957).

Again, in *Noel v. Linea Aeropostal Venezolana,*[36] 46 U.S. C. § 764 was relied on specifically to permit the recovery of nonpecuniary damages, in that instance loss of solatium, with the incorporation of Venezuelan law to supplement DOHSA.

Must American citizens who lose their lives on the high seas depend upon incorporation of the law of a foreign state in order to recover nonpecuniary damages? Must an American citizen who loses his life on the high seas be denied full recovery for the nonpecuniary damages sustained merely because of the fortuitous citizenship of a tortfeasor? Such grounds for permitting or denying recovery of particular damages lacks a rational basis and is contrary to the reasoning and sound grounds on which this Court decided the *Moragne* case.

"Territorial Restriction of *Moragne-Gaudet* Would Create New Anomalies"

Prior to *Moragne*, the rules of law which had evolved concerning the rights and remedies for wrongful deaths occurring on the high seas and in state territorial waters created three anomalies which the Court recognized as inequitable:

> [First] within the territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produced liability if the victim was merely injured, but frequently not if he was killed.

36. 260 F.Supp. 1002 (S.D. N.Y. 1966).

> [Second], identical breaches of the duty to provide a seaworthy ship, resulting in death, produced liability outside the three-mile limit . . . but not within the territorial waters of a State when a local statute excluded unseaworthiness claims.
>
> [Third], a true seaman–that is, a member of a ship's company, covered by the Jones Act was provided no remedy for death caused by unseaworthiness within territorial waters while a longshoreman to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, did have such a remedy when allowed by a State statute.[37]

These anomalies recognized by the Court have destroyed the constitutionally mandated uniformity of the maritime law.

> Our recognition of a right to recover for wrongful death under General Maritime Law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. [Citations omitted.] Such uniformity not only will further the concerns of both of the 1920 Acts [DOHSA and the Jones Act] but also will give effect to the constitutionally based principle that Federal Admiralty Law would be a 'system of law co-extensive with, and operating unformly in, the whole country.'[38]

37. *Moragne, supra,* 26 L.Ed. 2d at 353-354.
38. Id. at 350.

The anomalies created by the territorial distinctions noted by the Court in *Moragne* would be perpetuated and even new inconsistencies would be created if the *Moragne* cause of action for wrongful death were to be geographically limited solely to those deaths occurring on territorial waters. [39] For example, the rule of *The Hamilton*[40] would remain viable permitting actions to be brought under state law for wrongful death where the claimant and defendant are citizens of the same state.[41] Claimants who would be able to avail themselves of foreign law pursuant to 46 U.S. C. § 764 to complement DOHSA could recover nonpecuniary damages, whereas those unable to utilize that provision of the Act would be precluded from that recovery. *Finally, true seamen–those covered by the Jones Act–would be limited to recovery under the Jones Act and DOHSA and would be foreclosed from relying on a state statute to recover nonpecuniary damages, a remedy available to nonseamen who die on the high seas!* [42]

To territorially limit the holding of *Moragne* would limit the elements of recovery depending on the fortuitous location of the death and the citizenship of a tortfeasor. Why should elements of damages depend on these fortui-

39. See 2 *Benedict, supra*, §84, 7-37.

40. *Supra*, n. 31.

41. See, also, *Petition of Gulf Oil Corp.*, 172 F.Supp. 911 (S.D. N.Y. 1959), wherein Judge Palmiere utilized the provisions of the Pennsylvania survivor's action to supplement DOHSA for recovery of the decedent's pain and suffering.

42. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 13 L.Ed. 2d 199 (1964).

tous circumstances, particularly when a uniform body of federal law should apply? Should the rights of claimants be any more or less when delictual conduct is committed on the high seas rather than territorial waters? Respondent respectfully submits that to geographically restrict the *Moragne* cause of action would be an arbitrary and capricious limitation which contravenes the admiralty's "special solicitude for the welfare of those men who undertake to venture upon hazardous and unpredictable sea voyages" and contradicts the rule of the "humane and liberal character of proceedings in admiralty to give than to withhold the remedy."[43]

It is respectfully submitted that petitioner's reliance on *Barbe v. Drummond*[44] is misplaced for two reasons. First, the First Circuit was concerned with the issue of recovery on behalf of the administrator of decedent's estate damages for the decedent's conscious pain and suffering prior to death, an element of damages permitted by the survival action as opposed to a wrongful death action. It followed the lead of the Eighth Circuit to create a survival action under the General Maritime Law.[45] Second, "the *Barbe*

43. ". . . and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *Moragne, supra*, 26 L.Ed. 2d at 349, quoting from *The Sea Gull*, 21 Fed. 909, 910 (C.C. Md. 1865).

44. 502 F.2d 794 (1st Cir. 1974).

45. See *Spiller v. Thomas M. Lowe, Jr., & Associates* 466 F.2d 903 (8th Cir. 1972), and *Marsh v. Buckeye Steamship Co.*, 330 F.Supp. 972 (N.D. Ohio 1971); *S. Speiser, supra*, § 14:6 at 423 (2d Ed. 1975); J. Stein, *Damages and Recovery: Personal Injury and Death Actions*, § 268 at 606 (1972).

Court would allow conscious pain and suffering under the 'federal maritime survival action, created by decisional law' but would deny loss of society [and loss of services] for the same reason,"[46] an illogical result.

That court in dictum stated that DOHSA was the exclusive remedy for deaths occurring on the high seas. Yet, it employed the methodology used by this Court in *Moragne* to create a survival action permitting the recovery of non-pecuniary damages for the conscious pain and suffering of decedent prior to her death.[47] This contradition cannot be reconciled without concluding that the General Maritime Law complements and supplements the statutory remedies enacted by Congress: Decisional law as enunciated by this Court augments the lacunae left by congressional legislation.[48]

Many courts since the *Moragne* decision have reasoned that the cause of action created by that landmark case has no geographic limitations and that the statutory remedy may be joined with the jurisprudentially recognized remedy to permit recovery of the full panoply of damages for deaths occurring on land. In *Sennett v. Shell Oil Co.*[49] Judge Rubin analyzed the *Moragne* decision and concluded

46. *Law v. Sea Drilling Corp.*, 523 F.2d 793, 795 (5th Cir. 1975).

47. See *Speiser, supra*, § 14:5 at 421, n. 64.

48. Similarly, state law is adopted as surrogate federal law to fill the voids left by federal law for actions occurring on fixed platforms on the Outer Continental Shelf *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 23 L.Ed. 2d 360 (1969).

49. 325 F.Supp. 1 (E.D. La. 1971).

that Congress, by enacting DOHSA, did not intend to place a limitation on the recovery for maritime wrongful death:

> As *Moragne* pointed out,the policy implicit in the state and federal wrongful death statutes indicates that recovery for maritime death should be permitted absent 'a legislative directive to except a particular class of cases.' [Citations omitted.] Congress has not so directed. The Death on the High Seas Act is not an exclusive remedy for those whose relatives perish wrongfully one marine league from shore.[50]

The Fifth Circuit in this case concluded that the heirs of decedents could recover both pecuniary and nonpecuniary damages, pursuant to the nonstatutory maritime wrongful death action.[51] Pecuniary damages are recoverable under the statutory remedies, DOHSA and the Jones Act, where applicable. "The practical effect of such a procedure is to furnish a uniform remedy based on unseaworthiness to beneficiaries of seamen killed within and beyond state territorial waters."[52] This procedure is analagous to the joinder of the statutory Jones Act remedy with the jurisprudential remedy of unseaworthiness and maintenance and cure in personal injury litigation in order to obtain a jury trial.[53]

50. *id.* at 7; see also, *Nye v. Svendborg*, 358 F.Supp. 145 (S.D. N.Y. 1973); *Hammil v. Olympia Airways, S.A.*, 398 F.Supp. 829 (D.C. Cir. 1975); *Estate of Kauzlarich*, 405 F.Supp. 332 (D. S.C. 1975).

51. *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422 (5th Cir. 1977); *Thompson v. Offshore Co,*, 1977 A.M.C. 1434 (S.D. Tex. 1977); see, also *Dennis v. Central Gulf Steamship Corp.*, 453 F.2d 137 (5th Cir. 1972), *cert. den.*, 409 U.S. 948, 34 L.Ed. 2d 218 (1972).

52. 2 *Benedict, supra*, § 84 at 7-37.

53. *Fitzgerald, supra*, n. 15.

To limit the application of *Moragne* to territorial waters would effectively re-entrench in the maritime law a locality test alone which was abrogated by this Court in *Executive Jet Aviation v. City of Cleveland, Ohio*.[54] Maritime jurisdiction requires locality and a "significant relationship to traditional maritime activity."[55] The locality test is a simplistic but often difficult and perplexing rule to apply. This Court in *Executive Jet* noted that "not only is the locality test in such cases wholly adventitious, but it is sometimes almost impossible to apply with any degree of certainity."[56]

CONCLUSION

In summary, the proposition advanced by petitioner is unsupported by this Court's pronouncements in both *Moragne* and *Gaudet* and their progeny. Neither DOHSA nor the Jones Act exist in a vacuum to the exclusiveness of any other remedy, as this Court previously found and as is evidenced by the Act itself and its legislative history.

"Maritime law is not a monistic system."[57]

It is eclectic and borrows its substantive body from a wide range of sources. In fashioning the rules governing the General Maritime Law, this Court has woven together into a flexibile fabric elements of statutory, both federal and state, as well as decisional law. The statutory remedies, DOHSA and the Jones Act, need not rest in the briney deep and they need not be reduced to the "level of a nonstatu-

54. 409 U.S. 249, 34 L.Ed. 2d 454 (1972).

55. *Id.*, 34 L.Ed. 2d at 467.

56. *Executive Jet, supra*, 34 L.Ed. 2d at 466.

57. *Romero, supra*, 3 L.Ed. 2d at 383.

tory Restatement."[58] They may remain as a basis for the recovery of pecuniary damages for deaths occurring on the high seas and may be augmented by the remedy enunciated by this Court in *Moragne*.

Accordingly, respondent respectfully urges that the decision of the Fifth Circuit be upheld.

Respectfully submitted,

KIERR, GAINSBURGH,
BENJAMIN, FALLON & LEWIS

BY: _____

Jack C. Benjamin and
Arthur A. Crais, Jr.
1718 First National Bank of
Commerce Building
New Orleans, Louisiana 70112
504 - 522 - 2304

Attorneys for Mrs. Arline J.
Shinn, Ind., et al.

58. G. Gilmore and C. Black, Jr., *The Law of Admiralty*, § 6-33 at 369-370.

CERTIFICATE OF SERVICE

The undersigned counsel for respondent has caused three copies of the foregoing Responsive Brief on Behalf of Mrs. Arline J. Shinn to be served on Carl J. Schumacher, Jr., 1106 Arabella Street, New Orleans, Louisiana 70115; Jack Caldwell, 519 Main Street, Post Office Box 592, Franklin, Louisiana 70538; Messrs. Christovich & Kearney, American Bank Building, New Orleans, Louisiana 70130; Messrs. Thompson and Sellers, Post Office Box 308, 112 South Louisiana Avenue, Abbeville, Louisiana 70510; and I.P. Saal, Jr., Post Office Box 176, Gueydan, Louisiana, by placing same in the United States mail, postage prepaid, this 15th day of December, 1977.

_____

Jack C. Benjamin